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| <p>Appeal to Court of Appeal: Ottawa Gas Co. v. City of Ottawa, 1 O. W. R. 697, 5 O. L. R. 246.</p> <p>Appeal to Supreme Court of Canada: Smith v. Hunt, 1 O. W. R. 798, 5 O. L. R. 97.</p> <p>Attachment of Debts: McDonald v. Sullivan, 1 O. W. R. 721, 723, 784, 840, 5 O. L. R. 87.</p> <p>Church: Re Naylor, 1 O. W. R. 809, 5 O. L. R. 138.</p> <p>Company: Birney v. Toronto Milk Co., 1 O. W. R. 736, 5 O. L. R. 1.</p> <p>Copyright: Grossman v. Canada Cycle Co., 1 O. W. R. 846, 5 O. L. R. 55.</p> <p>Cross—Security for: Standard Trading Co. v. Seybold, 1 O. W. R. 724, 753, 5 O. L. R. 8.</p> <p>Criminal Law: Rex v. Hayward, 1 O. W. R. 799, 5 O. L. R. 65.</p> <p>Defamation: Hay v. Bingham, 1 O. W. R. 822, 5 O. L. R. 224.</p> <p>Defamation: Major v. McGregor, 1 O. W. R. 839, 5 O. L. R. 81.</p> <p>Discovery: Morrison v. Grand Trunk R. W. Co., 1 O. W. R. 758, 5 O. L. R. 38.</p> <p>Division Courts: Re Rochon v. Wellington, 1 O. W. R. 805, 5 O. L. R. 102.</p> | <p>Drainage Referee: McClure v. Township of Brooke, Bryce v. Township of Brooke, 1 O. W. R. 835, 5 O. L. R. 59.</p> <p>Executors and Administrators: McClenaghan v. Perkins, 1 O. W. R. 732, 5 O. L. R. 129.</p> <p>Gift: Davis v. Walker, 1 O. W. R. 3, 745, 5 O. L. R. 173.</p> <p>Judgment: Beaudry v. Gallien, 1 O. W. R. 703, 5 O. L. R. 73.</p> <p>Landlord and Tenant: Toronto General Trusts Corporation v. White, 1 O. W. R. 769, 5 O. L. R. 21.</p> <p>Landlord and Tenant: Farley v. Sanson, 1 O. W. R. 739, 5 O. L. R. 105.</p> <p>Lunatic: Re Norris, Re Drope, 1 O. W. R. 817, 5 O. L. R. 99.</p> <p>Municipal Corporations: Holmes v. Town of Goderich, 1 O. W. R. 367, 814, 5 O. L. R. 33.</p> <p>Municipal Corporations: King v. City of Toronto, 1 O. W. R. 843, 5 O. L. R. 163.</p> <p>Pleading: Dunlop Pneumatic Tire Co. v. Ryckman, 1 O. W. R. 699, 820, 5 O. L. R. 249.</p> <p>Pleading: Anthony v. Blain, 1 O. W. R. 841, 5 O. L. R. 48.</p> |
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Railway: Keith v. Ottawa and New York R. W. Co., 1 O. W. R. 104, 749, 5 O. L. R. 116.

Reference: Monroe v. Toronto R. W. Co., 1 O. W. R. 813, 5 O. L. R. 15.

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THE ONTARIO WEEKLY REPORTER.

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VOL. II. TORONTO, JANUARY 15, 1903. No. 1.

BOYD, C.

JANUARY 2ND, 1903.

TRIAL.

COULTER v. SWEET.

Costs—Scale of—Claim and Counterclaim—Jury.

Action tried with a jury at Windsor. The plaintiff's claim was for money taken by defendant and wrongfully converted to his own use. The jury awarded the plaintiff \$100 on this claim, and found in his favour on the counterclaim of the defendant for a declaration that plaintiff was liable to account for the principal and interest due on a promissory note for \$975.

J. H. Rodd, Windsor, for plaintiff.

E. A. Wismer, Essex, for defendant.

BOYD, C.—The costs should be taxed to the plaintiff of his claim on the County Court scale, without any set-off, and the costs of the counterclaim dismissed should be taxed to the plaintiff on the High Court scale.

GARROW, J.A.

JANUARY 2ND, 1903.

C.A.—CHAMBERS.

RE HUNGERFORD VOTERS' LISTS.

Parliamentary Elections—Voters' Lists—Notices of Appeal—Service—Leaving at Residence of Clerk—Time.

Case stated under sec. 38 of the Ontario Voters' Lists Act by the Judge of the County Court of Hastings.

One Michael Quinn, at between 9 and 10 o'clock of the evening of 10th November, 1902, the last day for serving notices on the clerk of the township of Hungerford of appeals against the voters' list, went to the clerk's dwelling-house, knocked at the door, and, not receiving any response, opened a wire screen door and placed the notices on the outside knob of a house door, and, having closed the screen door, went away, leaving the notices there. The door was on the west side of the house, and was not used as frequently as the door on the

east side. The following day, about noon, a member of the clerk's family discovered the notices, and brought them to the clerk, who was then in the house, and who then for the first time learned of the appeals.

The questions submitted were:

1. Were such notices served in time on the clerk?
2. Should they be acted on?

No counsel appeared to support the service.

W. B. Northrup, K.C., was heard opposing it.

GARROW, J.A.—In my opinion, the service was legally insufficient, and both questions should, therefore, be answered in the negative.

The language of the statute, R. S. O. 1897 ch. 7, sec. 7, sub-sec. 1, is, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc. This must mean, I think, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time. The case saves consideration of what we might have presumed if all that appeared had been simply the placing of the notices between the two doors, because it states distinctly that the clerk did not become aware of the notices until the next day, or a day too late. What actually happened is, I think, what might reasonably have been expected to happen under such circumstances, and I, therefore, think the service was wholly insufficient. See *Watson v. Pitt*, 5 C. B. 77, a decision under a statute containing somewhat similar language.

JANUARY 2ND, 1903.

ELECTION COURT.

RE SOUTH OXFORD PROVINCIAL ELECTION.

Parliamentary Elections—Controverted Elections—Appeal to Court of Appeal—Settlement of Appeal Case—Evidence Taken at Trial.

Application by the respondent to the trial Judges (STREET and BRITTON, JJ.) to settle the appeal book and define the parts of the evidence to be included therein.

S. H. Blake, K.C., and Eric N. Armour, for respondent.

G. H. Watson, K.C., for appellants, the petitioners.

STREET, J.—No machinery has been provided either by the Act or Rules for the settlement of a case upon an election

appeal. The result, therefore, appears to be, that either party is entitled to treat the whole evidence as being before the Court of Appeal, so far as it bears upon the subject matter of the appeal, and either party may ask the Court of Appeal to look at any part of the evidence taken at the trial of the petition, which he may consider relevant to the appeal.

BRITTON, J.—I agree that no machinery has been provided either by the Act or Rules for the settlement of a case upon an election appeal. That being the case, the trial Judges, after having given their decision and made their report, have no jurisdiction to act further, and they cannot give any direction as to what part of the evidence given at the trial should be submitted to the Court of Appeal.

MACMAHON, J.

JANUARY 3RD, 1903.

TRIAL.

CITY OF TORONTO v. GRAND TRUNK R. W. CO.

Highway—Dedication—Plan—Prescription—User—Railway—Estoppel.

The plaintiffs alleged that prior to 25th January, 1855, a large tract of land in the city of Toronto, near the mouth of the river Don, and on the west side thereof, was vested in fee in the trustees of the Toronto General Hospital; that on that day the trustees filed in the registry office for the city of Toronto a plan, No. 108, by which such tract of land was divided into blocks, lots, and streets; that on or before that day Cherry street was dedicated as and for and became a public highway; that the plaintiffs had spent large sums of money to improve Cherry street, and the defendants had been assessed by plaintiffs for part of the cost of such improvements and had paid the amounts assessed; and the plaintiffs asked to have it declared that Cherry street extends across and beyond the right of way of the defendants' railway, and that that street was dedicated and used as and for and became a public highway before the acquisition and use by defendants of their right of way.

The right of way crosses the marsh immediately south of what would be Cherry street if extended to the marsh. In July, 1890, defendants constructed gates across what the plaintiffs allege is Cherry street to prevent the public from crossing the right of way, but in the following September the gates were removed by plaintiffs' orders and have not since been replaced.

In July, 1899, the plaintiffs applied to the Railway Committee of the Privy Council to direct the defendants at their own cost to protect the public from the danger arising from the passing of trains across Cherry street. The application stands adourned until the disposition of this action.

J. S. Fullerton, K.C., and A. F. Lobb, for plaintiffs.

Walter Cassels, K.C., and Walter Gow, for defendants.

MACMAHON, J. (after setting out the facts and referring to the evidence):—Assuming, as I must, that the plan registered by the hospital trustees in July, 1855, shews correctly the work done on the ground, it is clear there was no dedication by the trustees of Cherry street south of Mill street as a highway.

Joseph Cadieux, who came to the locality in 1844, said that Cherry street was then open, and that a stream of water ran north-east, and a pond was there which he passed over in his skiff. Lots 10, 11, and 12 were not conveyed by the trustees to Jones until 1850, and lots 13 to 19 to Barnes not until about the same time, and a fence was not built on the west side of 13 until 1859, so that these lots formed an open common, and, according to the evidence of Latham, the traffic was not confined to any definite way. But, even if it be assumed that the public in 1850 commenced to use what is now alleged to be Cherry street, it required thirty years' user to confer a right of way to the public.

There being no right of way created by prescription south of Mill street, and no dedication of a highway by the trustees, they could up to 1880 have sold and conveyed to a purchaser the 60 feet running south of Mill street to the marsh.

If the plaintiffs could not up to that date have contended that it was part of the highway known as Cherry street, as against a purchaser from the trustees, I cannot comprehend how they can successfully contend that in 1857, when the defendants went there, Cherry street formed part of the highway across which they built the railway embankment.

No act done by defendants has created an estoppel preventing them from setting up that when they went there in 1857 and built an embankment through the marsh, Cherry street did not extend further south than a line co-terminous with the north edge of the marsh.

Judgment dismissing the action with costs and declaring that Cherry street does not extend across the right of way of defendants.

BRITTON, J.

JANUARY 3RD, 1903.

TRIAL.

CORNELL v. HOURIGAN.

Mortgage—Covenant—Sale of Equity of Redemption—Agreement to Look to Purchaser—Novation—Neglect of Assignees of Mortgage to Insure—Trusts—Parol Evidence.

An action upon the covenant in a mortgage made by defendants upon hotel property in the village of Freelon.

D. O. Cameron, for plaintiff.

G. Lynch-Staunton, K.C., for defendants.

BRITTON, J.—The mortgage in question bears date the 17th September, 1889, and is for \$1,500 payable in 10 yearly instalments of \$150 each, with interest at 6 per cent. per annum. It was made by the defendants, husband and wife, the property apparently belonging to his wife, in favour of J. M. Lottridge and others. The husband kept an hotel in the house upon the premises until about 25th April, 1893, when the property was sold to Frank Howes. The mortgage had then been reduced to \$1,200. Frank Howes was to assume the mortgage, and pay the balance in cash. At this time J. M. Lottridge was the owner of the mortgage, the other mortgagees having assigned to him. The account of the transaction given by the husband defendant is that he told Frank Howes he would sell subject to the mortgage, if Lottridge would take Howes for the \$1,200. He says he introduced Howes to Lottridge, and said to Lottridge: "If you will take him so as to have no more claim on me, I will sell." Lottridge confirms this, so far as he recollects the transaction. Nothing was said about the wife or to her, although she was the owner of the property. . . . Frank Howes went into possession, and continued the hotel business. The mortgage in question contained the usual covenants for payment and to insure. . . . The building was destroyed by fire in October, 1895. The insurance had been allowed to expire. The person interested in this suit—the real plaintiff—is W. W. Howes, father of Frank Howes, the mortgage having been assigned to Cornell, the nominal plaintiff, for the purpose of collection. . . .

The real defence relied on by defendants is, (1) an alleged agreement between J. M. Lottridge and the defendants to release defendants and look only to the property and to Frank Howes, of which agreement it is said that W. W. Howes was aware when he purchased the mortgage, and that he bought knowing and agreeing that he was to look only to the property and to Frank Howes, and that he was not to look to either of the defendants; and (2) that W. W. Howes, after the purchase of the mortgage, went into possession and was until time of fire mortgagee in possession, and that it was his duty to insure and keep insured, and by reason of his neglect he cannot recover. . . .

There is no evidence that Frank Howes was a trustee for W. W. Howes and that W. W. Howes was the real purchaser of the land from Mrs. Hourigan. Nor does it appear that W. W. Howes in purchasing the mortgage was a trustee for Frank Howes, or that he was acting for Frank. . . .

want of authority, if the making of the note was in fact an unauthorized act. . . . The proper conclusion is, I think, that the plaintiffs honestly and on reasonable grounds believed that defendants were their debtors, and that the promissory note of defendants was rightly given in settlement of their indebtedness to plaintiffs. . . .

It is perhaps unnecessary to express any opinion upon the point taken by Mr. Lewis, that the defendant company did not come into existence until the letters patent had been accepted by the applicants, or at all events until the recording of the letters patent took place.

I am inclined to think that, even without the provisions of sec. 9 of the Companies Act, R. S. O. 1897 ch. 191, the acceptance of the letters patent, at all events in the absence of any evidence to the contrary, was unnecessary, or is to be inferred from the fact that they were granted upon the petition of the applicants and in accordance with the prayer of their petition.

However that may be, sec. 9 is decisive upon the point, and makes it necessary for me to hold that the defendant company came into existence as a body corporate and politic on the 11th December, 1899, the date of the letters patent.

The plaintiffs are, therefore, entitled to judgment for \$550, the balance remaining due on the promissory note for \$863.28, with interest from the 20th December, 1901, but not for the open account. For it McRae was not liable as surety, but only as principal, if at all, and the plaintiffs have chosen to take judgment against his estate for the amount of it, and that, according to the case I have referred to, prevents the plaintiffs from recovering against the real principal, the defendant company.

The claim relating to the transactions prior to the incorporation of the defendant company was not pressed, and there are difficulties in the way of giving effect to it which do not, as it appears to me, apply to the claim in respect of the subsequent transaction.

The judgment for plaintiffs will be with costs.

MEREDITH, C.J.

DECEMBER 30TH, 1903.

CHAMBERS.

QUA v. CANADIAN ORDER OF THE WOODMEN OF
THE WORLD.

*Pleading—Reply—Leave to Deliver after Time Expired—Jury Notice
—Notice of Trial—Irregularity—Close of Pleadings.*

An appeal by defendants from an order of the Master in Chambers allowing plaintiff to deliver a reply after the time

for delivering one had expired; and motion by defendants to set aside as irregular a notice of trial served by defendants within four days after the delivery of the reply, no joinder of issue having been delivered.

The action was upon a policy of life insurance. The defendants set up that the policy was avoided by untrue representations made by the insured in his application for the insurance. The reply was that the statements alleged to be untrue were made innocently and were not material.

J. H. Moss, for defendants.

R. B. Beaumont, for plaintiff.

MEREDITH, C.J.—I do not think I should interfere with the discretion exercised by the Master in Chambers. It may be that the reply is somewhat open to the objection that all that it seeks to put in issue was already in issue by the statement of defence; still the purpose of it was to enable the plaintiff to file a jury notice, and I think it is a case in which plaintiff should have that right. . . . Some Judges may think it a case which should be tried by a jury. . . . What I am doing will leave it quite open to the Judge at the trial to exercise his discretion and try the case without a jury, if he thinks it ought to be so tried.

With regard to the other matter, I think Rules 257 and 258 make it reasonably clear that Mr. Moss's contention is right. The reply could have been delivered without leave within the time prescribed by the Rules. As I understand Rule 257, read in connection with Rule 262, which provides that the pleadings are to be deemed to be closed as soon as either party has joined issue simply, it is clear, I think, that the defendants had four days within which, if they chose, to file a joinder of issue, or, if they found it necessary to do so, to apply for leave to deliver a further pleading; they had, however, in any case, the right to file a joinder of issue within the four days.

The pleadings were not, I think, therefore, closed until the lapse of the four days, or until they had joined issue, and notice of trial having been given before the lapse of that time, and without a joinder of issue having been delivered, was irregularly given.

I have no power to allow the notice of trial to stand; that would be, in effect, to disregard the cases which hold that there is no power to abridge the time allowed defendant unless he is in such a position that terms may be imposed upon him.

Appeal dismissed, and notice of trial set aside. Costs in the cause.

MACLENNAN, J.A.

JANUARY 5TH, 1903.

C.A.—CHAMBERS.

McLAUGHLIN v. MAYHEW.

Appeal—Entry after Time—Motion to Confirm—Refusal of Respondent to Consent—Delay by both Parties—Costs.

Motion by defendants, appellants, to allow the entry and setting down of the appeal, which were made out of time, to stand notwithstanding the irregularity.

F. E. Hodgins, K.C., for the motion.

O. M. Arnold, Bracebridge, for the plaintiff, respondent.

MACLENNAN, J.A.—Judgment for the specific performance of a contract for the sale of land, delivered on the 22nd April, 1902. Notice of appeal, 19th May; security by deposit of \$200, 22nd May. Reasons of appeal served 10th September, and reasons against appeal, 13th October. These dates shew considerable delay in preparing reasons by both parties, for which no sufficient excuse is shewn by one or the other. The next sittings was on the 10th November, and the case should have been set down not later than the 6th November to be on the list for that sittings. From the 13th October everything was in order, but to prepare the appeal case and the copies thereof, and what the appellants' solicitor says is, that, owing to unforeseen delays, the books were not received back from the printer properly bound and ready for the setting down of the appeal, that is, as I understand, before the 6th November. On the 7th November the appellants' solicitor wrote to the respondent's solicitor saying he was getting the books prepared as fast as possible, and would have the case put on the list, to which the latter replied on the same day, noting that the books would be completed in a few days, "when I will receive the same." On the following day, however, he wrote saying, "Please, do not ask me to consent to the appeal going on now," and that it would be unjust to ask the plaintiff to wait any longer. This was answered on the 10th, urging consent to set the case down for the sittings beginning on that day. An answer was received on the 15th, saying he must consult his client. No final answer was received until the 10th December, when consent was refused. In the meantime the case was set down on the 17th November.

The present motion was made as soon as the refusal of the 10th December was received.

Under all these circumstances, having regard to the dealings on both sides, and to all that had passed between the parties, the respondent's solicitor might well have consented to the setting down of the case as requested in the letter of the 10th November. If that had been done, the appeal

might have been heard, and this motion would have been unnecessary.

One of Mr. Arnold's arguments was that the appellant had not given the security required by Rule 827 (c), and so his appeal was fatally irregular. But the security required by that Rule is not essential to an appeal, but only to a stay of execution.

I therefore think the motion to confirm the setting down of the case should succeed, but, as both parties are nearly equally blameable for delay, there should be no costs.

MEREDITH, C.J.

JANUARY 7TH, 1903.

CHAMBERS.

RE HOLDEN.

*Will—Construction—Property Passing—"Now"—Stock in Trade—
Furniture—Books—Legacy—Incomplete Words*

Motion upon originating notice under Rule 938 for an order declaring the construction of the will of S. O. Holden, deceased, which was in these terms:—"I give, devise, and bequeath all my real and personal estate of which I may die possessed of or interested in, in manner following, that is to say, first, I give to my sister Eliza Jane Isaac the house and land with all household furniture and all stock and trade now in house and out of house with all book accounts," subject to two legacies of \$100 each. The testator was the keeper of a village shop, and shortly after making his will sold his house, land, and business, but subsequently repurchased them.

W. T. Allan, Collingwood, for the universal legatee and administratrix with will annexed.

J. Birnie, K.C., for B. F. Holden.

G. W. Bruce, Collingwood, for W. J. Holden.

MEREDITH, C.J.—Though the bequests were specific, they were specific bequests of what was generic, and they were therefore brought down to the date of the death by R. S. O. ch. 128, sec. 26 (1). if no contrary intention was expressed. See *Bothamley v. Sherson*, L. R. 20 Eq. at pp. 312-313; *Goodlad v. Burnett*, 1 K. & J. 341. In spite of the use of the word "now" (as to which see *Theobald on Wills*, 5th ed., pp. 114-115; *Jarman on Wills*, 5th ed., pp. 298-299), it is beyond question that the testator did not intend to limit his gift to property owned by him at the date of the will. The constituents of the gift of the stock in trade and book debts were changing from day to day and from hour to hour, and, as the language of the gift itself was ambiguous, the opening

declaration might be referred to as interpreting it. To decide otherwise would result in there being an intestacy as to a part. Further, "stock" has a recognized meaning as a fund, capital—the money or goods employed in trade"—and the gift of the "stock and trade" therefore included money on deposit with testator's banker. cash in hand, promissory notes, cordwood for dwelling and shop, horses, harness, and vehicles, used in the business not very frequently, but as occasion required. The shop fixtures would pass with the land. The books are to be considered household furniture, although cases to the contrary are to be found. The term is elastic. and may vary according to habits and mode of living. Now everybody has books, and it would be a surprise to find that books were not, though pictures were, household furniture. As to the pecuniary legacies, the will provides that the universal legatee shall "pay" to one of testator's brothers \$100, and continues "also she shall one hundred dollars" to another brother. The legacy is nevertheless well given: *Parker v. Tootal*, 11 H. L. C. 143. Order accordingly. Costs out of estate.

FALCONBRIDGE, C.J.

JANUARY 6TH, 1903.

TRIAL.

TODD v. TOWN OF MEAFORD.

Railway—Municipal Corporation—Expropriation of Land—Agreement with Land-owner—Construction—Damages—Injury to Prospective Business—Costs.

Action against the town corporation and the Grand Trunk Railway Company to recover damages for injuries sustained by plaintiff by reason of the defendants wrongfully taking certain of plaintiff's lands for the purpose of straightening the Big Head river, thus depriving the plaintiff of the land which he required, or would in the future require, to meet the needs of his expanding business, and injuring him by increasing the difficulties of access and in other ways. The plaintiff had agreed to sell his land to the defendant railway company and to allow them to take immediate possession, without prejudice to him, and subject to the further stipulation that the acceptance of \$400 from the company was to be without prejudice to the plaintiff's claim for damages "by flooding (if any) owing to the diversion of the Big Head river."

E. E. A. DuVernet and Grayson Smith, for plaintiff.

R. C. Clute, K.C., and J. S. Wilson, Meaford, for defendants the town corporation.

G. F. Shepley, K.C., and W. H. Biggar, K.C., for defendants the railway company.

FALCONBRIDGE, C.J., held that neither of the defendants could, in view of the agreement, be held to have been trespassers. The damages anticipated by plaintiff (claimed for the first time in his statement of claim) from his inability to expand his business to the extent he otherwise might have done, were so speculative and uncertain as to be beyond the limits of judicial calculation. *Hamilton v. Pittsburg B. & L. E. R. Co.*, 190 Pa. St. 51, and *The Queen v. Fowlds*, 4 Ex. C. R. 1, referred to. The \$375 paid into Court by defendants was adequate compensation for the land taken and the only damage shewn, viz., to plaintiff's rip-rap. Judgment for the \$375 in Court. Plaintiff to pay costs as if both defendants had appeared by one solicitor and had been represented by the same (two) counsel at the trial.

BRITTON, J.

JANUARY 6TH, 1903.

TRIAL.

SMITH v. CAREY.

Parliamentary Elections—Ontario Election Act—Penalties—Voting without Right—Knowledge—"Wilfully"—Neglecting to Take Oath.

Action for penalties under the Ontario Election Act. The defendant had until about six months before the election resided in the electoral division of the county of Frontenac. He then sold his place there and moved into the city of Kingston. Believing that he was not on the voters' list at his old residence, he presented himself for registration, and was registered as a manhood suffrage voter in the city. He consented to act as agent for Mr. Shibley, one of the candidates for the electoral division of the county of Frontenac, and as agent received a certificate authorizing him to vote at the polling subdivision where he was to act "instead of the Bath Road polling subdivision," this being the first intimation he had had of the fact that he was on the township voters' list. Under the authority so received he, after taking the oath of secrecy only, voted at the subdivision where he was acting as agent, doing so in the presence of his friends and acquaintances and ignorant that residence was requisite to entitle him to so vote. By reason of this fact, he was now proceeded against for three penalties: (1) under sec. 168 for \$100 for voting, knowing that he had no right to vote, being a non-resident of the electoral district; (2) under sec. 181 for \$200 for wilfully voting without being qualified, not being resident; and (3) under sec. 94 (5) for \$400 for having voted without having taken any oath of qualification, having received from the returning officer a certificate, upon the allegation that he was an agent.

John McIntyre, K.C., and E. H. Smythe, K.C., for plaintiff.

J. L. Whiting, K.C., and H. McDonald Mowat, Kingston, for defendant.

BRITTON, J., held, on the first claim, that the defendant did not vote knowing that he had no right to vote. Actual knowledge that he was doing something wrong was necessary: Perth case. 2 Ont. Elec. Cas. 31, 32. On the second claim he held, that wilfully voting as in sec. 181, applying it to the facts of this case, was practically the same as the first claim, and that defendant had not incurred the penalty: *Wilson v. Manes*, 28 O. R. 419; *Re Young and Harston*, 31 Ch. 168. On the third claim, he held, that defendant had violated the sub-section and was liable in \$400, but that the penalty should be reduced, under R. S. O. ch. 108, to \$40, there being no suggestion of fraud or intentional wrong-doing. Judgment for \$40 and costs on the third claim, the extra costs of the first and second claims to be set off.

MEREDITH, J.

JANUARY 9TH, 1903.

CHAMBERS.

RE HENDERSON.

Will—Construction—Devise—Condition — Survival — Heirs—Title—Vendor and Purchaser.

The will of George Henderson was as follows: "After the payment of all my just debts and the following legacies to my children, viz., to my sons Hubert and John \$100 each, to my daughters Isabella and Marian \$50 each, to my daughter Emma \$100, all my property, personal and real, I bequeath to my wife Mary Henedrson. The aforementioned legacies to my children shall be paid by my wife out of the proceeds of the farm and within a period of five years. Should my sons survive my wife, my farm shall revert to my sons Hubert and John, and in case of their decease to their heirs—said farm shall be equally divided between my two sons. I appoint Edward McHardy my sole executor."

The testator died on the 14th January, 1884. His son Hubert Henderson died on the 30th May, 1892, intestate, leaving a widow and children. Mary Henderson, widow of the testator, died on the 5th June, 1897.

The following question was presented for decision upon an application under the Vendor and Purchaser Act: What estate, if any, did the devisee John Henderson and the heirs of the devisee Hubert Henderson take in the lands in question, under the will, and under the facts and circumstances set forth in an affidavit, and, can they, notwithstanding the

devise in the will to Mary Henderson, make title to the lands in question?

W. H. Blake, K.C., for the vendors.

MEREDITH, J.—My opinion is, that, upon the death of Mary Henderson, John Henderson and the heirs of Hubert Henderson took the whole estate of which the testator died seised in the land, but subject to the legacies charged upon it by the will, if any of them remained unsatisfied; and that, notwithstanding any estate which Mary Henderson took under the will, they can make title.

BOYD, C.

JANUARY 10TH, 1903.

CHAMBERS.

RE DENNIS.

Will—Construction—Devise of Land, at Majority—Vested Estate Subject to be Divested—Benefit of Rents During Minority—Costs of Summary Application for Construction—Affidavits.

Motion by executors upon an originating notice under Rule 938 for an order declaring the construction of a clause in the will of Jarvis Dennis, deceased, the question being how the rents were to be disposed of during the infancy of testator's grandson, the will being altogether silent upon the point. The land was devised to the infant at majority, but he was not then residuary devisee.

T. Brown, Norwich, for executors.

G. G. Duncan, Norwich, for residuary devisee.

F. W. Harcourt, for the infant.

BOYD, C.—The land devised to the grandson when he arrives at 21 is, by the effect of the proviso that if he dies before receiving the share devised it is to go over, to be treated as vesting in him now, but subject to be divested should he die before attaining 21. See *Phipps v. Ackers*, 9 Cl. & Fin. at p. 591. The effect of this construction will be to give the infant the benefit of the surplus rent of the place which remains over and above what is duly and properly expended for repairs thereon. This is to be not less than \$50 each year, but this amount may be exceeded if the necessity arises in the opinion of the executors. Order accordingly. Costs out of the surplus of rents; but no affidavits are to be taxed which are of a contentious nature and are not of service in presenting the neat question of law.

BRITTON, J.

JANUARY 7TH, 1903.

TRIAL.

CAREY v. SMITH.

Parliamentary Elections—Ontario Election Act—Penalties—Bribery—Change in Statute—Civil Remedy Gone—Voting without Taking Oath

Action against the financial agent of John J. Gallagher, one of the candidates for the Legislature of Ontario for the county of Frontenac, (1) under sec. 159 (2) of the Ontario Election Act for \$200 for bribery by giving money to one Eli Peters, a voter, to influence him to vote for Gallagher; and (2) under sec. 94 (5) for \$400 for voting without having taken the oath of qualification, having received from the returning officer a certificate entitling him to vote elsewhere than at the subdivision at which his name was on the list.

J. L. Whiting, K.C., and J. McDonald Mowat, Kingston, for plaintiff.

John McIntyre, K.C., and E. H. Smythe, K.C., for defendant.

BRITTON, J., held, as to the first claim, that the bribery was proved. Section 159 (2) had until 1900 read as follows:—"Every person so offending shall incur a penalty of \$200;" but in that year it was amended to read: "Every person so offending shall, on conviction, incur a penalty of \$200 and shall also be imprisoned for a term of six months." This amendment must have been intended to change not only the punishment, but also the way of dealing with offenders, and to prevent an informer proceeding in a civil action for the penalty. This result was to be regretted, but was inevitable. The second charge, he held, was made out, but the penalty should be reduced to \$40. Judgment for defendant on the first charge without costs, and for plaintiff for \$40 and general costs of the action on the second charge.

BRITTON, J.

JANUARY 7TH, 1903.

TRIAL.

LIDDELL v. COPP-CLARK CO.

Copyright—Infringement—Historical Work—Evidence of "Piratical" Use of Copyrighted Book

Action by the executors of the late Dean Liddell for an injunction and for damages for the infringement of their copyright in Dean Liddell's History of Rome in the writing and publication of Robertson and Henderson's High School History of Greece and Rome.

G. F. Shepley, K.C., for plaintiffs.

D. E. Thomson, K.C., and J. B. Holden, for defendants the Copp-Clark Co.

C. A. Moss and A. B. Colville, for defendants Robertson and Henderson.

BRITTON, J.—It was practically admitted that every statement of fact and inference from fact in Dean Liddell's book could have been obtained by the defendants, the authors of the High School History, from common sources, but the particulars charged a resemblance between the two books in 155 instances, in some of which the resemblance was striking, in some so remote that in dealing with the same subject matter, and being true to history, it could not have been less. The plaintiffs urged that the defendants had not the right to save themselves the labour of going to original sources of information or to save themselves the labour of literary work. In nearly every case, if not in every one, the defendants did refer to what might be considered original sources of information. As to the sketch, which defendants used in their book and which was very similar in Dean Liddell's, even in view of the admission of the place whence it was secured, and of the fact that there was no colourable alteration of it, yet in such a sketch there was hardly any such thing as absolute originality, and there should be no finding in plaintiffs' favour upon it alone. They had permitted its use to Dr. Smith, and from its use were not likely to sustain any damage whatever. See *Spiers v. Brown*, 6 W. R. 352. Defendants' book was not in any considerable part a transcript of plaintiffs'; nor were parts of the latter introduced into the former with only colourable additions and variations, without any real independent literary labour. See *Garrold v. Heywood*, 18 W. R. 279; *Blakewell v. Holcomb*, 3 M. & Cr. 737. Defendants had not been guilty of what could fairly be called "extensive copying," or "extracting the vital part" of plaintiffs' book. See *Moffatt v. Gill*, 49 W. R. 438; *Chatterton v. Cave*, L. R. 10 C. P. 572, 3 App. Cas. 483.

Judgment for defendants with costs.

BOYD, C.

JANUARY 8TH, 1903.

WEEKLY COURT.

HEFFERNAN v. TOWN OF WALKERTON.

Municipal Corporations—By-law—Payment to Mayor—Procedure at Meeting of Council—Reference to Committee—Majority of Council—Mayor not Voting—Sealing By-law—Fraction of Day.

Motion by plaintiff to continue injunction granted by local Judge at Walkerton restraining the defendants from paying \$125 to the mayor for his services to the town as mayor. The parties agreed that the motion should be turned

into a motion for judgment. A by-law authorizing the payment was first introduced in June, 1902, but was not finally passed until 13th December.

J. E. Jones, for plaintiff, contended: (1) that there was not the necessary majority in favour of the by-law under sec. 85 of the procedure by-law of the town, which required that, in the case of a money by-law, there should be a vote in its favour of two-thirds of the members present at the meeting; (2) that the by-law was not referred to the committee of the whole, as required in the case of money by-laws passed after the adoption of the estimates; and (3) that the by-law was not sealed when acted upon.

There had been 7 members present at the meeting, among them the mayor, who did not vote. The by-law had been carried by four to two, the mayor not voting presumably under another section of the procedure by-law. The cheque had been written out by 9 a.m. on the morning of 14th December; the by-law was not sealed at 11 a.m.

A. Shaw, K.C., for defendants the town corporation, opposed the application.

BOYD, C.—The money appears to have been paid to the mayor for his costs of a law suit, and to have been included in the estimates. On the question of the reference to the committee of the whole, it appears that it was a mere matter of procedure, which this Court should not interfere with, when it has been considered by the whole council. On the point of the majority, the procedure by-law made it clear that the mayor need not vote if he did not desire to, the by-law distinguishing the mayor from the members. His ruling as to the majority was final, and it seems that the vote was a two-thirds vote. The objection, therefore, fails. The objection as to the sealing of the by-law is a technical one, and the by-law having been sealed on the same day as the transaction was carried out, the day would not be divided into parts, but the transaction would be considered to have been sufficiently authorized.

Action dismissed with costs.

STREET, J.

JANUARY 8TH, 1903.

TRIAL.

KING v. MATTHEWS.

Municipal Corporations—Local Improvements—Illegal Expenditure on Sidewalk—Action by Ratepayer against Members of Council—Bona Fides—Protection of Statute.

Action by plaintiff on behalf of himself and all ratepayers of the town of Port Arthur, except the defendants, who were

members of its council, to recover moneys of the municipality spent in practically re-constructing a sidewalk in the town which had fallen into disrepair by reason of the neglect of former councils, and so required the re-construction which was carried out. The claim was based upon sec. 5 of the special Act incorporating the town (47 Vict. ch. 57 (O.)), which provided that "all expenditure in the municipality for the improvements and services for which special provisions are made in secs. 612-624 of the Consolidated Municipal Act, 1883, shall be by special assessment on the property benefited and not exempt."

H. L. Drayton and D. Mills, Port Arthur, for plaintiff.

N. W. Rowell, K.C., and W. F. Langworthy, Port Arthur, for defendants.

STREET, J., held, that the members of the council had the authority of Meredith, C.J., in *Re Medland* and the City of Toronto, 31 O. R. 243, for believing that what they did was no more than they could be compelled to do under 63 Vict. (2) ch. 26, sec. 41. They had acted in perfect good faith, and in the bona fide belief that they were doing their duty as trustees for the general body of ratepayers. The Act 62 Vict. (2) ch. 15, sec. 1, seemed wide enough to apply to protect them, even if not within its strict letter, in view of the disinclination of the Courts, even before that Act, to render liable municipal officers honestly doing their duty: *Baxter v. Kerr*, 13 Gr. 367.

Action dismissed with costs.

STREET, J.

JANUARY 8TH, 1903.

TRIAL.

SMITH v. HUGHES.

Specific Performance—Contract for Sale and Purchase of Land—Action by Nominal Purchaser—Undisclosed Principal—Property of Speculative Value—Purchaser Sleeping on his Rights

Action for specific performance of a contract dated 29th August, 1900, signed by defendant Hughes, whereby he agreed to sell to plaintiff for \$1,500, of which \$50 was to be paid in cash, a certain brickyard. The defendant Plummer was under agreement to sell the yard to the defendant Hughes. The plaintiff made the contract as agent for an undisclosed principal, and on the day following the making of the contract went to Hughes and got from him an agreement to pay him (plaintiff) \$50 for his services in procuring the sale, since, as he said, the purchaser would pay nothing. This purchaser was one Hamilton, who on 21st September told Hughes he was ready to complete upon the title being made satisfactory.

On the 28th of the same month Plummer, to whom Hughes referred Hamilton, wrote the latter explaining his title, and saying it was all he had, and on 3rd April, 1901, Plummer tore up the deed sent him for execution, saying that he would not complete by reason of the delay. The action was commenced on 9th April. Plaintiff's application to add the defendant Plummer as a party defendant, threw the case over the summer sittings of 1901; it was not reached in September; was not brought on at the special sittings in November; and was tried only at the Winter Assizes. Nothing was ever paid upon the contract.

A. B. Aylesworth, K.C., and J. E. Irving, Sault Ste. Marie, for plaintiff.

M. McFadden, Sault Ste. Marie, for defendant Hughes.

W. R. Riddell, K.C., and P. T. Rowland, Sault Ste. Marie, for defendant Plummer.

STREET, J., held that the objection as to plaintiff being a mere agent, though perhaps of weight, did not need to be given effect to, it having been made for the first time at the trial, and in view of the decision on the merits. On the merits, the value of the land was of a speculative and fluctuating character, and the purchaser was, therefore, bound to proceed with reasonable diligence. He, however, had slept upon his rights, and his conduct was open to the charge that he had been endeavouring to keep alive his claim upon the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy in case it should happen to depreciate. See *Huxham v. Llewellyn*, 21 W. R. 570; *Glasbrook v. Richardson*, 23 W. R. 51. Action dismissed with costs.

FALCONBRIDGE, C.J.

JANUARY 9TH, 1903.

TRIAL.

WHELIHAN v. HUNTER.

Municipal Corporations—Expenditure—Valid Debt—By-law—Contract—Injunction—Costs

Action by plaintiffs, on behalf of themselves and all rate-payers of the town of St. Mary's, against the corporation of the town, and against the members of the finance, fire, water, and light committees of the council for 1902, as individuals, for a declaration that an item of \$3,170 in the report of the finance committee, which it was alleged was introduced into the estimates for the purpose of building a certain water-main, was a valid debt of the corporation which they were bound to provide for during the current year, and for an injunction restraining them from making any payment upon the contract for the water-main in question, on the ground that there was no valid or subsisting contract for the

work, there having been no by-law authorizing it till after this action was begun.

J. P. Mahee, K.C., for plaintiff.

J. Idington, K.C., for defendant corporation.

J. W. Graham, St. Mary's, for individual defendants.

FALCONBRIDGE, C.J., held that, in view of secs. 402 and 435 of the Municipal Act (R. S. O. ch. 223), it was doubtful if the debt was a valid debt of the corporation, and that this doubt was sufficient reason for dismissing the action, since the holders of the note given for the liability in question were not parties. Action dismissed. No order as to costs as between plaintiff and the defendant corporation, but plaintiff to pay the costs of the individual defendants, except those incurred on the proceedings for the interlocutory injunction.

JANUARY 9TH, 1903.

DIVISIONAL COURT.

RE PHELAN.

Will—Construction of—Validity of Restriction on Devise—Res Judicata—Case Stated by Master of Titles.

Case stated by the Master of Titles and referred to the Divisional Court by order of a Judge (1 O. W. R. 741). The question was whether Ellen Phelan was entitled to be registered as owner of certain lands free from a provision restrictive of alienation contained in the will of one D. T. O'Sullivan, whereby he devised the land to two nephews (O'Sullivan) subject to the condition that "neither of my said nephews is to be at liberty to sell his half of the said property to anyone except to persons of the name of O'Sullivan in my own family. This condition to attach to every purchaser of the said property." Ellen Phelan was a sister of one of the nephews. The Master asked whether the provision in the will was valid, and, if not, whether the applicant was entitled to be registered as owner free from the condition. The Judge who referred the case was of opinion that the condition was void, but that he was bound by the decision of Robertson, J., in O'Sullivan v. Phelan, 17 O. R. 730.

W. Proudfoot, K.C., for Ellen Phelan.

F. W. Harcourt, for infants.

THE COURT (BOYD, C., MEREDITH, J.) held that as, upon investigation, it appeared that the case relied upon as an estoppel had gone to the Court of Appeal, by which the judgment of Robertson, J., was vacated, but that no final judgment was ever pronounced, the case having been remitted by the Court of Appeal for want of parties, the Master of Titles was, therefore, free to decide untrammelled by any decision binding upon him, but guided by the opinion expressed

by the Judge. Neither of the questions submitted answered, some of the persons possibly interested not being parties. Question of parties and other questions to be re-argued if either party desires it.

JANUARY 9TH, 1903.

DIVISIONAL COURT.

PRING v. WYATT.

Malicious Prosecution—Reasonable and Probable Cause—Case for Jury—Search Warrant—Theft—Information not Charging Crime—Amendment.

Appeal by plaintiff from judgment of nonsuit by County Court of Middlesex. The plaintiff's claim was for damages for malicious prosecution in defendant's having caused to be laid against plaintiff an information that he "unlawfully did have and keep in his possession and take away a black collie dog, the property of W. H. W." Upon this information a search warrant, and later a summons, was issued. At the hearing, the information, without being resworn, was, on application of defendant's counsel, amended by the insertion of the word "stole." The County Judge held that there was an entire absence of the proof necessary to shew that defendant laid the information with a want of reasonable and probable cause, or maliciously, and that the action could therefore not be left to the jury.

J. H. Moss, for plaintiff.

J. R. Meredith, for defendant.

THE COURT (BOYD, C., MEREDITH, J.) held that, as to the search warrant, the judicial action of the magistrate had absolved the defendant from liability in that respect: *Hope v. Good*, 17 Q. B. D. 338; *Smith v. Evans*, 13 C. P. 62.

BOYD, C., held that there was ample evidence of an intention to conduct a criminal prosecution: *Sinclair v. Hughes*, 16 U. C. R. 247; *Crawford v. Beattie*, 39 U. C. R. 13.

MEREDITH, J., held that the prosecution was the result of an error of judicial opinion in the magistrate's assumption that the information gave him jurisdiction, although the word "steal" or "theft" did not appear in it; that the defendant had not desired to institute criminal proceedings; and that, so far as the defendant was concerned, the information truly stated the facts, the dispute being purely one about the ownership of the dog. The defendant was, therefore, not liable.

BOYD, C., held that the Judge below was wrong in holding that a man might put the criminal law in motion where there was no crime and then shelter himself behind the action of the magistrate, and that the case should have gone to the jury.

Case to be re-argued if either of the parties desires it.

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WINCHESTER, MASTER.

JANUARY 12TH, 1903.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. SCOTT.

Discovery—Affidavit on Production—Identification and Description of Documents—Schedules—Mortgages—Discrepancies—Particulars—Striking out or Amending.

Motion by defendants for a further and better affidavit on production from plaintiffs shewing specifically and in detail the books, papers, and documents relating to each mortgage in respect of which the plaintiffs are suing, and disclosing the books and portions of books which refer to each mortgage, and giving the pages and such other references as may be necessary, and accounting sufficiently for the absence of such papers relating to the mortgages as have been in the custody or control of plaintiffs and are not now produced; and also for an order striking out some words in the particulars delivered, and for better particulars.

W. H. Blake, K.C., for defendants.

W. M. Douglas, K.C., for plaintiffs.

THE MASTER.—A party should not be required to give, in an affidavit on production, such details as are sought in this case. All that is required is a list of the documents, books, etc. They should be clearly identified, and their nature should appear from the description given, but a separate description need not be given of every document. *Taylor v. Bullen*, 4 Q. B. D. 85, *Budden v. Wilkinson*, [1893] 2 Q. B. 432, *Cooke v. Smith*, [1891] 1 Ch. 509, and *Milbank v. Milbank*, [1900] 1 Ch. 376, 384, referred to. It has also been held that if the documents are described at unnecessary length, the party may be ordered to pay the unnecessary costs occasioned thereby, or the affidavit may even be taken off the files as being prolix or oppressive: *Hill v. Hart-Davis*, 26 Ch. D. 470, 472; *Walker v. Poole*, 21 Ch. D. 836. See also *McDonnell v. McKay*, 2 Ch. Ch. 141. Therefore, as far as the ledgers are concerned, plaintiffs are not required to give the pages,

etc. With reference to the letter books, the solicitor for plaintiffs wrote pointing out that there was nothing in them which was material, but saying that plaintiffs produced them in order that defendants might satisfy themselves. See *Bolton v. Natal Co.*, [1887] W. N. 143, 178. It is improper for a party to produce a number of letter books in this way. If they are not material, they should not be produced; if any are material, they should be identified. The affidavit should be remedied in this respect. In schedule A to the affidavit there were set forth the names of the mortgagors, together with the dates of the applications for loans in respect of the mortgages. Upon referring to schedule B, where the dates of these mortgages were set out, it appeared as if the applications, in some of the cases, did not refer to the mortgages mentioned in schedule A. The explanation given as to these apparent discrepancies by counsel for plaintiffs was that in the cases referred to, and others, the mortgage, while bearing date as given in schedule B, was not given direct to plaintiffs, but was sold or assigned to them, and the application for a loan on such a mortgage was dated as in schedule A at the time the mortgage was being sold or assigned to the plaintiffs, and that a perusal of the documents produced would have given all the information and discovery necessary. The explanation given shews that the assignments or mortgages of these mortgages should have been produced and this must now be done. *Tipping v. Clarke*, 2 Hare 383, 389, referred to. The defendants have a right to have the documents referred to in the particulars and the schedule to the affidavit on production correctly and fully produced. Instead of having two schedules to the affidavit, it would have been better to have made but one, setting out in it the number of the mortgage, the mortgagor's name, date of mortgage, description of property, amount advanced, date of application and of valuation, as also all other documents relating to such mortgage. As this has not been done, the giving of such production as has been omitted must be provided for. With reference to the valuations, a supplementary affidavit was filed, covering all that could be found. Until it is shewn by affirmative evidence that valuations other than those produced are in possession of plaintiffs, further production cannot be ordered.

By an order of 9th July, 1902, plaintiffs were directed to deliver particulars under the 14th and 15th paragraphs of their statement of claim, shewing in what respect it is alleged that the investments made for the plaintiffs were improper, and in what respect it is alleged that the moneys of the plaintiffs were improperly advanced, and in what respect it is alleged that James Scott (defendants' testator) was guilty of a breach of his duty as vice-president and a director of the

plaintiffs, and in what respect he was guilty of a breach of trust with regard to such investments. In the particulars delivered and objected to, the plaintiffs stated that "the investments . . . were improper because they were made upon unimproved, vacant property in the outlying and unsettled districts of Toronto, and of the town of Toronto Junction, and of the township of York . . . and because, as the said James Scott must have been fully aware the security for the advances was insufficient." The words of the last clause of the particulars quoted are more like a pleading than particulars. *Milbank v. Milbank*, [1900] 1 Ch. 376, 385, referred to. This statement being in reality an amendment of the pleading, particulars of it must be given, or in default it must be struck out. As to particulars of the losses claimed, the manner in which these losses were made up was explained by plaintiffs' counsel on the argument. This will be sufficient when embodied in the order made on this motion. The particulars as delivered are not very clear in some respects, and should be corrected. When this is done, the particulars may stand, unless on examination for discovery other objections may be found to exist. The affidavit on production and particulars to be amended within ten days.

OSLER, J.A.

JANUARY 12TH, 1903.

C.A. —CHAMBERS.

**CITY OF HAMILTON v. KRAMER-IRWIN ROCK
ASPHALT AND CEMENT PAVING CO.**

Appeal—Court of Appeal—Dispensing with Copies of Evidence for Use of Judges — Question of Construction of Contract.

Application by defendants (appellants) for leave to set down the appeal without the usual copies of appeal cases containing the evidence taken at the trial, etc.

A. B. Aylesworth, K.C., for appellants.

W. R. Riddell, K.C., for plaintiffs.

OSLER, J.A.—The appeal may be set down for the next session of this Court, the appellants lodging for the present but one copy of the evidence, and delivering one to the respondents. I understand that the appellants limit their appeal to the question of the construction of the contract or contracts between the parties, and, as I do not at present see what bearing the oral evidence is likely to have upon that question, though the respondents are entitled to have such evidence before the Court, and insist upon it, the trial Judge having made it part of the record in appeal, it is not necessary that further copies of the evidence for the use of the

Judges should be lodged at this time or the expense of making them incurred. That may be ordered to be done hereafter, if the course taken in argument of the appeal should make it necessary. As to the conduct of the argument, whether it should be divided, etc., etc., no direction can be given. That will be a matter for the Court. The parties will no doubt agree as to what documents, exhibits, etc., shall be copied in the appeal book, and as to that no direction at present. Costs of application to be costs in the cause.

WINCHESTER, MASTER.

JANUARY 13TH, 1903.

CHAMBERS.

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

Writ of Summons—Service—Unincorporated Foreign Voluntary Association—International Association—Service upon Executive Officer in Ontario—Conditional Appearance.

Application to set aside the writ of summons and service thereof upon D. A. Carey for and on behalf of the American Federation of Musicians (9th District), upon the grounds that there is no provision in the Rules authorizing service upon the defendants by means of service on Carey, and that the defendants, not being an incorporated body or partnership, cannot be so served. The action was against the Federation and Carey for an injunction restraining them from endeavouring to induce or persuade one Creswell and the members of his orchestra engaged by plaintiff at the Grand Opera House, London, Ontario, to refuse to continue in plaintiff's employment. An order was made on the 11th December, 1902, allowing plaintiff to add as defendants a number of persons "on behalf of themselves and all other members of the American Federation of Musicians and of the London Musical Protective Association," etc., and the writ of summons was amended accordingly.

J. G. O'Donoghue, for the motion.

C. A. Moss, for plaintiff.

THE MASTER, after referring at length to the evidence as to the constitution of defendants and their officers, cited and quoted from the cases of *Massey v. Woodward* (per Meredith, J., 20th March, 1900); *Taff Valley R. W. Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426; and *United States v. Coal Dealers' Assn.*, 85 Fed. Rep. 252; and concluded: In this action the writ of summons has been served upon the executive officer in Ontario of the defendants the American Federation of Musicians. It is an international association, and exercises jurisdiction in Ontario

just as much as it does in any state of the Union. The Federation has been properly served with the writ. With reference to the objection that the name is improperly used because of its being an unincorporated company or association, the cases cited are sufficient authority for holding that on a summary application the name should not be struck out, represented as the Federation is by the large number of persons added by the order of the 11th December. In order, however, that the Federation may not be prevented from having the question gone into more fully at the trial, a conditional appearance should be permitted.

Motion dismissed. Order made allowing the Federation to enter a conditional appearance. Costs in the cause.

[See *Metallic Roofing Co. v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Assn.*, 1 O. W. R. 573, 644.]

WINCHESTER, MASTER.

JANUARY 13TH, 1903.

CHAMBERS.

CAVANAGH v. CASSIDY.

Security for Costs—Plaintiff Ordinarily Resident out of the Jurisdiction—Temporary Residence in Ontario.

Action for false arrest and malicious prosecution. Motion by defendant for an order for security for costs, on the ground that plaintiff is ordinarily resident out of the jurisdiction of this Court, and only temporarily resident within it.

J. E. Cook, for defendant.

S. B. Woods, for plaintiff.

THE MASTER.—The arrest was made in connection with some transaction in regard to the purchase of shares. The defendant, having lost a considerable sum of money, and accusing plaintiff and one Tucker of having defrauded him, caused the arrest of the former. The plaintiff is a telegraph operator, and has for some years been operating on wires in connection with different brokers' businesses. When about 2 or 3 years of age his family removed from Ontario to the United States, and he has until recently lived in that country. He is now 36 years of age or upwards. His mother and sister still live in the United States, and when out of employment and at other times he makes his home with them. He is unmarried, and has no property other than what he carries about with him from place to place. In July, 1902, he left Kansas City, where his mother and sister reside, and went to New York to take employment with stock-brokers there. In September, 1902, he was sent by them to Toronto

to inspect their branch office, expecting that it would be but a temporary visit, but after a week or two he received instructions to remain in Toronto in their service. They, however, removed their branch office from Toronto, and another person took possession of the wire which they had, and retained the plaintiff as an employee. This person has also now withdrawn, and the plaintiff is at present out of employment.

All the evidence shews that plaintiff is only temporarily resident in Ontario, while ordinarily resident in the United States. His past life seems to have been one of constant change from place to place, although Kansas City, where his mother and sister live, has been his headquarters. His evidence indicates that he will not remain in Toronto unless satisfactorily employed. *Allcroft v. Morrison*, 19 P. R. 59, 65, referred to.

Order made for security in the usual form. Costs in the cause.

WINCHESTER, MASTER.

JANUARY 16TH. 1903.

CHAMBERS.

RE CLEGHORN AND ASSELIN.

Sale of Goods—Statute of Frauds—Actual Delivery—Samples—Conduct of Parties—Carriers' Interpleader.

Summary trial of an interpleader respecting the ownership of three car-loads of potatoes held by the Canadian Pacific Railway Company, on whose application the matter was brought into Court. The parties consented to a summary disposition of the claims in Chambers.

W. N. Tilley, for Cleghorn & Co.

W. J. Elliott, for Oscar Asselin.

THE MASTER.—The claimants Cleghorn & Co. asserted that they purchased the potatoes from Oscar Asselin, the other claimant, while he denied that there ever was any completed contract respecting them. The contest was as to the conduct of the parties, it being contended on behalf of Cleghorn & Co. that such conduct was sufficient to take the bargain out of the Statute of Frauds, that is, that there was an actual sale by Asselin, accepted by Cleghorn & Co., and delivery made to them. The potatoes were shipped by Asselin from a point in the Province of Quebec to Toronto, consigned by the bills of lading to his own order. Asselin and one Fournier, employed by Asselin, arrived in Toronto last Christmas morning, and met Cleghorn, who went with them to look at the potatoes, when the prices were mentioned. Cleghorn picked up one or five potatoes from each car—he

said the latter quantity, while Asselin and Fournier mentioned the former—and took them to his office, as he said, as samples. This act did not constitute a delivery of the potatoes, bringing the bargain within the provisions of the statute, the evidence being clear that there was no closed bargain at that time, not even the quantities being known by Cleghorn & Co., and there being no intention whatever on the part of Asselin to deliver samples, his consent to taking them not having been asked: *Hinde v. Whitehouse*, 8 Rev. Rep. 676; *Klinitz v. Surry*, ib. 833; *Gorman v. Body*, 2 C. & P. 145; *Gardner v. Grout*, 2 C. B. N. S. 340. There were subsequent negotiations about the potatoes. The bills of lading were handed to Cleghorn by Asselin, but were not indorsed. The parties disagreed about the price, Asselin wanting a higher price than Cleghorn was willing to give. The carriers refused to let Cleghorn have the potatoes without the bills of lading indorsed by Asselin. I find that at no time did Asselin part with the potatoes; that there was no contract closed by the parties; and that the acts of Cleghorn did not bring the bargain within the provisions of the statute and cases. *Taylor v. Smith*, [1893] 2 Q. B. 65, and cases therein cited, and *Norman v. Phillips*, 14 M. & W. 277, 280-282, referred to. There being no contract binding on Asselin he is entitled to the potatoes. Order accordingly and for payment by Cleghorn & Co. of all costs and expenses occasioned by their claim, including the costs before the Master.

JANUARY 16TH. 1903.

DIVISIONAL COURT.

RE AMERICAN TIRE CO.

DINGMAN'S CASE.

Company—Winding-up—Preferred Claim—"Clerk or Other Person in Employ of Company"—Sales Agent.

Appeal by Archibald W. Dingman from the decision of the Master in Ordinary (in the course of the winding-up of the company), that the appellant was not entitled to rank on the assets of the company as a preferred creditor, by virtue of sec. 56, sub-sec. 2, of the Winding-up Act, R. S. C. ch. 129, and amending Acts, as being a "clerk or other person in the employ of the said company."

A. W. Holmsted, for the appellant, contended that, as by the terms of his employment, he had to devote his whole time and attention to the business of the company, as mechanical expert and inspector to the department of the company having charge of the sale of the "New Departure Coaster Brake,"

and as sales agent therefor for the city of Toronto, he was a clerk or other person in the employ of the company.

H. M. Mowat, K.C., for the liquidator.

FALCONBRIDGE, C.J.—Having regard to the very curious nature of the evidence relating to the claim, e.g., that the amount of remuneration was fixed about the middle of February, 1902, when the company was in extremis, and that Davis, the company's manager (who was not called), two or more days after the liquidator went into possession, certified this account and instructed the accountant of the company to make an entry in the books relating to it, and to "put it through" as of 1st January, the Master took a lenient view of claimant's position when he allowed claimant to rank on the estate as an ordinary creditor. But I do not suggest that he was wrong, and the liquidator has not appealed. . . . The evidence furnishes abundant ground for holding that the claimant is not entitled to any preference under the statute: *Re Ontario Forge and Bolt Co.*, 27 O. R. 230.

BRITTON, J., gave reasons in writing for the same conclusion.

Appeal dismissed with costs.

BOYD, C.

JANUARY 10TH, 1903.

WEEKLY COURT.

ATTORNEY-GENERAL v. BROWN.

Revenue—Succession Duty—Value of Estate—Deduction to Meet Contractual Obligation—Donatio Mortis Causa—Estoppel by Judgment in Former Action—Survivorship.

Special case in action to recover succession duty upon the estate of Benjamin Brown, who died intestate and childless, his estate going to brothers and nephews and nieces.

A. B. Aylesworth, K.C., for the Attorney-General.

F. Arnoldi, K.C., for defendant Amanda Brown.

A. L. Colville, Campbellford, for the other defendants.

BOYD, C.—Succession duties may be recovered by action, and therein the Court has jurisdiction to determine what property is liable to duty under the Act 62 Vict. (2) ch. 9, secs. 1, 2.

In this case it is admitted in the pleadings that the aggregate value of Brown's estate was \$12,877, and of this it is admitted \$7,540 passed to the hands of the defendant Amanda

Brown. The manner of its reception by Miss Brown is, however, in dispute. The contest is whether this sum is "dutiable," for if it is not and it falls to be deducted from the "aggregate," then the estate is not subject to the Act. By a process of amendments it is now the law that the Act shall not apply to any estate the value of which after the allowances authorized by the Act (are deducted) does not exceed \$1,000: R. S. O. ch. 24, sec. 3, sub-sec. 1, as amended by 1 Edw. VII. ch 8, sec. 4.

"Dutiable value" is defined by the Act as the value of the property after the debts or other allowances or exemptions authorized by the Act are deducted: 1 Edw. VII. ch. 8, sec. 3 (3). And by the same section and by sub-sec. 4, it is said that in determining the dutiable value of the estate of a deceased person for the purposes of the payment of succession duties, the value shall be taken as at the death, and allowances shall be made for reasonable funeral expenses and for his debts and incumbrances.

And any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property.

But no allowance shall be made for debts incurred by the deceased, or incumbrances created by the deceased, unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth, wholly for the deceased's own use and benefit, and take effect out of his interest. These provisions are all found in 1 Edw. VII. ch. 8, sec. 3 (4).

These clauses may apply to this transaction between the deceased and his niece Miss Brown if it be taken that the \$7,500 was not transferred before death to the defendant. If it be the better view that there was such a transfer, the other clauses of the Act have to be considered, which, however, lead to the same legal issue. By R. S. O. ch. 24, sec. 4 (b), all property . . . which shall be voluntarily transferred . . . by gift made in contemplation of the death of the donor or intended to take effect in possession or enjoyment after such death, and (c) property taken as a donatio mortis causa or other disposition by way of gift, etc., etc., shall be subject to succession duty. The essential point to be observed in these sub-sections (b) and (c) is that the transaction is a voluntary one, *i.e.*, for which there is no consideration. It may be that the extent of consideration is intended to be defined by sec. 4 (10), which enacts that nothing herein contained shall render liable for duty any property bona fide transferred for a consideration that is of a value substantially equivalent to the property transferred. But, assuming that this applies, the test to ascertain whether a transaction is or

is not "voluntary," the transfer in question will answer the test abundantly.

The nature of the transaction was investigated in *Brown v. Toronto General Trusts Corporation*, 32 O. R. 319.

Upon the trial of that case, and upon the same evidence as is now relied on, I found as a fact that there was well proved an agreement between the deceased and his niece Amanda Brown whereby they were to combine their chattel property and their personal energies in the working of the farm used by the deceased, and its belongings, upon a mutual obligation that the survivor should become possessed of the whole personalty resulting from this co-operation of goods and labour.

In pursuance of this agreement, which had existed and been acted on in good faith for over 30 years, the deceased handed over to her just before his death the indicia of title to moneys and other property such as might be the subject of a *donatio mortis causa*. And I found that what was done was sufficient to establish her right to that property in the aspect of a mere gift, but beyond that I gave effect to the agreement by declaring her entitled to other chattel property falling under the above agreement to the amount of several hundred dollars. The moneys bestowed amounted to over \$6,000. As against the claim of the Crown for succession duty, it is competent for Amanda Brown to avail herself of every ground of exemption afforded by the law. She is not, in other words, as to the present claim estopped by the form of the judgment in the case of *Brown v. Toronto General Trusts Corporation*, but may rely on other aspects of the real liability which existed between her and the deceased.

Now, while the handing over of the \$6,000 moneys, etc., may be rested on the mere *donatio mortis causa*, it is in truth much more than this; the bestowment was not a matter of bounty—it was, as I have declared in giving reasons for the judgment in *Brown v. Toronto General Trusts Corporation*, a matter of obligation binding upon the deceased and his estate. If it happened, as it did, that the uncle should predecease her, then this personal estate did not pass beneficially to his next of kin or legal representatives; it became in that event potentially the property of his niece, and her right to it has been vindicated by the Court as against the administratrix. She did not succeed to his personal estate by any testate or intestate right—by no voluntary disposition on the part of the deceased and by no legal transmission as upon an intestacy—but by virtue of a valid and long standing contractual obligation, which made her more than a general creditor in respect to this personalty.

Taking this basis of fact as well established, it appears evident that the bestowment of this property before the death

was not such a voluntary disposition or transfer by the intestate as is specified in the Act. Full value of money's worth was given for all that was received. The whole country-side knew of the agreement, and the neighbours proved that her work and services were worth more than all she got under the agreement.

Therefore on the facts I find that the property was transferred for a consideration substantially equivalent in money's worth to its value. And on the other aspect of the case I find that there was at the death of the intestate a debt due by him to his niece in respect of work and services in the house and on the farm as a nurse exceeding \$6,000 bona fide incurred.

This sum, say \$6,000, should be deducted from the aggregate value of the estate, and so it results that Brown's estate is not within the Act.

I have not overlooked the argument that this case falls within sec. 4 (d) of the Revised Statutes, ch. 24, but that provision is addressed to another sort of property which passes by survivorship, i.e., joint tenancies created by the deceased when absolutely entitled to the whole. That does not fit this case. It is also to be distinguished from this when the property in question does not pass or accrue by survivorship, i.e., by operation of law, having regard to the nature of the estate or interest in the property, but is the subject of an express agreement which takes effect at the death as part of the contract. The right does not arise because of the death, but by virtue of the prior agreement between the parties, upon which their whole course of action was based for 36 years.

The action should be dismissed with costs.

BOYD, C.

JANUARY 12TH, 1903.

WEEKLY COURT.

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

*Trade Union—Interference between Master and Servant—
Interim Injunction—Balance of Convenience.*

Motion by plaintiff to continue interim injunction restraining defendants from persuading the members of the orchestra of plaintiff's theatre at London to refuse to play for plaintiff. The defendants were a large organization with headquarters in the United States. London was included in their 9th district, of which one Carey, of Toronto, was the chief executive officer. He informed plaintiff that unless one Evans, who was the leader of plaintiff's orchestra last

season, was reinstated, the defendants would order the members of the orchestra to refuse to play.

W. Barwick, K.C., and C. A. Moss, for plaintiff.

J. G. O'Donoghue, for defendants.

BOYD, C., held that the machinery of defendants' organization having been brought to bear against plaintiff in his management of the business at London, on assumptions of fact and law which are disputed, weighing the advantages against the disadvantages, it is more convenient in the interests of the plaintiff to have the present orchestra continued in his employment till the trial than to have any interruption or discontinuance by the active intervention of defendants; and this course will be in no wise detrimental to defendants, even if they are found to be in the right on the merits. Relevant issues of fact present themselves for determination. The language of Darling, J., in *Read v. Friendly Society of Operative Stonemasons of England, Ireland, and Wales*, [1902] 2 K. B. 88, 96, is pertinent.

Injunction continued till the trial. Action to be tried at the earliest opportunity. Costs reserved to be disposed of by the trial Judge or upon further order.

MEREDITH, C.J.

JANUARY 16TH. 1903.

TRIAL.

LONDON LIFE INS. CO. v. MOLSON'S BANK.

Bills and Notes—Cheques—Forged Indorsements—Payment by Bank—Conduct of Agent of Drawers—Estoppel.

Action tried without a jury at Ottawa. The plaintiffs sued to recover from defendants, who were their bankers, moneys which were paid, as plaintiffs alleged, without their authority, and improperly charged to their account, having been made upon cheques drawn by plaintiffs on defendants, payable to various persons or their order, the indorsements of which by those persons were, as plaintiffs alleged, not genuine, but forged. The defendants defended on the grounds: (1) that the cheques were payable to fictitious or non-existent persons within sec. 7, sub-sec. 3, of the Bills of Exchange Act, 1890, and were therefore payable to bearer; and (2) that if they were to be treated as payable to the order of real payees, the defendants were justified, under the

circumstances, in paying them and debiting them to plaintiffs' account. The proceeds of all the cheques came into the hands of a man named Niblock, who was the plaintiffs' assistant-superintendent at Ottawa, and were appropriated by him to his own use by means of a system of fraud and forgery on his part. The cheques were issued for the purpose of paying supposed claims of the several persons in whose favour they were drawn, under policies of insurance made by plaintiffs, and in the belief by plaintiffs that the persons upon whose lives the policies had been granted had died; but in fact none of them had died, and there was no real claim by any of the beneficiaries against plaintiffs. In all of the cases but five the applications on which the policies were issued were entirely fictitious, the names of the supposed applicants and of the supposed signers of the documents which accompanied them being forged. In all of the cases the signatures to the proofs of loss were also forged, as were the indorsements purporting to be those of the payees of the cheques.

A. B. Aylesworth, K.C., and Edgar Jeffery, London, for defendants.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for plaintiffs.

MEREDITH, C.J., reviewed the evidence at length, and held that all the cheques were paid by defendants in good faith, and upon the representation of Niblock, acting for plaintiffs, that the persons to whom payment was made were the persons named in the cheques as payees; and, that being so, that the plaintiffs were affected by what was done by Niblock so as to preclude them from disputing the right of defendants to pay the cheques and charge the amount paid to plaintiffs' account. The other question, as to the payees of the cheques being fictitious persons, was not considered. Action dismissed with costs.

BRITTON, J.

JANUARY 17TH. 1903.

CHAMBERS.

WOODRUFF v. ECLIPSE OFFICE FURNITURE CO.
OF OTTAWA.

Security for Costs—Application for Increased Security—Trial Practically Concluded.

Appeal (heard at Ottawa) by plaintiff from so much of an order of the local Master at Ottawa as directed that plain-

tiff should give further and additional security for the costs of defendant company, by a bond for \$600 or by paying into Court \$300.

F. A. Magee, Ottawa, for plaintiff.

H. A. Burbidge, Ottawa, for defendant company.

BRITTON, J.—The trial of the action had come on, the case had been argued, and it was directed that if plaintiff did not elect to amend within the time allowed, the case was to stand for judgment. The plaintiff did amend. Security for the costs of defendants added by the amendment has been ordered. No application was made at the trial for additional security to the defendant company. It was open to the defendant company to ask that in the event of an amendment additional security should be given. If the trial Judge had made any such condition, it may be that plaintiff would not have accepted. The case is practically closed as to defendant company. If it so happens that the costs of the defendant company will be substantially increased, it will be by reason of what occurred at the trial, and the view the trial Judge took of the case; and the plaintiff ought not at this stage to have the additional burden put upon him. *Bell v. Landon*, 9 P. R. 100, and *Simon v. La Banque Nationale*, 7 P. R. 22, referred to.

Application allowed with costs to plaintiff in any event.

MEREDITH, C.J.

JANUARY 16TH, 1903.

WEEKLY COURT.

RE RATHBUN CO. AND STANDARD CHEMICAL CO.
OF TORONTO.

Arbitration and Award—Application to Court to Direct Arbitrators to State Case—Questions of Law—Questions Specifically Referred—Conduct of Applicants Alleged to Bar Them from Applying—Discretion of Court—Special Competence of Arbitrators—Doubt as to Rulings—Construction of Contract—Form of Case—Costs.

Application under sec. 41 of the Arbitration Act, R. S. O. ch. 62, by the Standard Chemical Company of Toronto, one of the parties to a voluntary reference to arbitration, for a direction to the arbitrators to state in the form of a special case for the opinion of the Court certain questions of law arising in the course of the reference.

W. Laidlaw, K.C., and J. Bicknell, K.C., for the applicants.

E. D. Armour, K.C., and C. A. Masten, for the Rathbun Company.

MEREDITH, C.J. (after stating the facts):—Upon the argument I expressed the opinion that as to certain of the questions no direction should be given, and as to others I reserved my decision.

The questions reserved for decision were : (1) Whether upon the true construction of the contract the applicants were, for the 66 cords of wood delivered daily (Sundays excepted), bound to deliver 85,000 bushels of charcoal per month, or whether delivery of what was or might have been, with proper care and skill and without waste, produced from the wood, though less than 85,000 bushels per month, was a compliance with the terms of the contract. (2) Whether there had been a breach of the agreement on the part of the applicants which entitled the Rathbun Company to take possession of the works. (3) Whether the claim of the Rathbun Company for the use of more than 66 cords per day was properly the subject of a reference to arbitration under paragraph 22 of the agreement.

It was objected by counsel for the Rathbun Company: (1) That the dispute as to the construction of the contract was a question specifically referred, and that sec. 46 was inapplicable, because the question was not one "arising in the course of the reference." (2) That the applicants were precluded by the course taken by them on the reference from invoking the aid of the Court under sec. 41. (3) That at all events, as a matter of discretion, the direction asked for ought not to be made. . . .

I have come to the conclusion that the first objection is not well founded. Owing to the way in which the reference to the arbitrators has been effected, it is necessary to spell out from the various documents by which it was completed the subject-matter of the reference, and, as I understand the effect of these documents, one of the claims of the Rathbun Company, and the principal one, is that the applicants have not delivered the quantity of charcoal which, under the terms of their agreement, it was their duty to deliver, and to recover damages for that breach. The Rathbun Company do not rest their claim solely upon the construction of the contract for which they contend, but, while taking the position that that construction is the right one, they also assert that, even if the contention of the applicants as to the meaning of the

contract is right, there has been a shortage in the delivery of charcoal for which they are entitled to recover damages. The claim which is by the notice of the applicants of 17th April, 1901, referred to arbitration is the claim of the Rathbun Company "for alleged shortage of the delivery of charcoal produced or which ought to have been produced from the said wood." The claim as to this branch of the case which is by the Rathbun Company's notice of the 10th July, 1901, referred, is that the Rathbun Company were entitled to receive, and that the applicants were bound to deliver, 85,000 bushels of charcoal per month, and compensation or damages for the shortage in delivery of charcoal.

I do not read this as meaning that the question of the obligation of the applicants to deliver 85,000 bushels of charcoal, irrespective of what they had or might have produced from the daily supply of 66 cords of wood, was specially referred, but as bearing a reference of the claim of the Rathbun Company for damages for short delivery of the charcoal, a shortage being claimed whatever view might be taken as to the meaning of the agreement.

I think, therefore, that this question was one arising in the course of the reference, within the meaning of sec. 41.

It is, in this view, unnecessary to express an opinion as to whether or not the meaning of the words "arising in the course of the reference" is that for which counsel for the Rathbun Company contended.

As to the second question . . . much was done by counsel for the applicants in the course of the proceedings before the arbitrators to lead to the conclusion that the applicants did not desire that a case should be stated by the arbitrators. . . . It does appear, however, that counsel for the applicants before the arbitrators, at a comparatively early stage of the proceedings, gave notice that after the evidence had been taken he would apply to the arbitrators to state a case for the opinion of the Court, and that application he did make later. . . .

I have come to the conclusion that, having regard to the very large amount at stake, and the fact that the agreement has several years yet to run, and that the construction which the arbitrators put upon it will conclude the applicants not only as to the damages now claimed, but as to future operations under the agreement in the years for which it has to run, and also to what I cannot help thinking is a serious question as to the correctness of the interpretation which the

arbitrators have put upon the contract, I ought not to refuse the application if it is otherwise well founded.

In re Hansloh and Reinhold, 1 Com. Cas. 215, followed.

Mr. Armour also relied upon the fact that actions had been brought by the Rathbun Company to restrain the applicants from proceeding under their notices to arbitrate, and that the motions for injunctions to that end were resisted by the applicants. The object of these actions, it was said, was to have the construction of the contract determined by the Court, and it was urged that, having prevented that being done, and having insisted upon the method of determining the questions in dispute being by arbitration, the applicants ought not now to be allowed to avail themselves of the provisions of sec. 41.

The answer is, that one of the incidents of an arbitration is or may be the stating of questions of law for the opinion of the Court . . . and it may well be that the applicants preferred, as they had a right to do, to have their disputes settled by arbitration, with the opportunity . . . of having the arbitrators advised by the Court . . . to having the disputes, including questions of fact and assessment of damages, dealt with in an action. . . .

That a party to a reference is not entitled *ex debito iustitiæ* to have the direction given whenever a question of law arises in the course of the reference is, I think, clear. The matter is one resting in the discretion of the Court. . . .

Re Nuttall and Lynton, 82 L. T. 17, was referred to as authority for the proposition that where the arbitrators are specially qualified to decide the question of law, the discretion should not be exercised in favour of giving the direction, but I do not understand that any such general proposition is laid down. . . .

The fact that an arbitrator is specially qualified to decide the question of law is a circumstance which, taken in connection with other circumstances, may affect the exercise of the discretion. . . . I can see no reason why such a rule should be applied where the arbitrator has ruled upon the question of law, or is about to do so, and it is open to serious question whether his actual or intended ruling is right. . . .

In re Tabernacle and Knight, [1892] A. C. 298, 301, 302, referred to. James v. James, 23 Q. B. D. 12, distinguished. In re Palmer and Hosken, [1897] 1 Q. B. 131, also referred to.

Under all the circumstances, I have come to the conclusion that my discretion should be exercised in favour of granting the application as respects the questions as to which I reserved judgment. . . .

An order will, therefore, issue directing the arbitrators to state in the form of a special case the three questions.

I refer to *In re Richmond Gas Co.*, 62 L. J. Q. B. 172, as to the form of a case stated under sec. 19 of the English Act.

I make no order as to costs, but leave them to be dealt with by the arbitrators: *In re Knight and Tabernacle*, [1893] 2 Q. B. 613.

THE ONTARIO WEEKLY REPORTER.

(To and including January 24th, 1903.)

VOL. II. TORONTO, JANUARY 29, 1903. No. 3.

JANUARY 19TH, 1903.

DIVISIONAL COURT.

LUDLOW v. BATSON.

Slander—Words not Actionable per se—Profit of Special Damage—Loss of Consortium of Wife—Loss of Boarder.

Motion by plaintiff to set aside nonsuit entered by STREET, J., at the trial at Brantford in an action for slander, and for a new trial. One Olive Batson, niece of plaintiff's wife, whose parents had died when she was quite young, had lived with plaintiff and his wife for twelve years, plaintiff receiving an allowance for the child's board from her father's executors, of from \$2.50 to \$3 a week. The defendant was a brother of Olive Batson, and the allegation was that defendant said that plaintiff put in an account to William Campbell (one of the executors) for candies, oranges, Sunday school collections. The innuendo in the statement of claim was, that plaintiff made up a fictitious account and by false pretences obtained payment thereof from Campbell, and was therefore guilty of an indictable offence. At the trial plaintiff's counsel admitted that the words were not capable of the meaning charged, but contended that the words were actionable upon proof of special damage. The special damage charged was that plaintiff's wife left him because of these statements made by defendant. The trial Judge held that the words sworn to were not actionable, even if the special damage alleged were proved, and he rejected evidence thereof.

W. S. Brewster, K.C., for plaintiff.

J. Harley, K.C., for defendant.

FALCONBRIDGE, C.J.—Any words are actionable by which the party has a special damage: *Moore v. Meagher*, 1 Taunt. at p. 44; *Odgers on Libel*, 3rd ed., 95, 96, 97; *Ratliffe v. Evans*, [1892] 2 Q. B. 524, 527. Inquiry in this case is, therefore, limited to the question whether this alleged special damage is such as the law will recognize as being the natural and reasonable result of defendant's words, or whether it ought to be deemed too remote. It cannot be considered the fair and natural result of the speaking of these words. If

plaintiff's wife left her husband's home on this account, she plainly acted without reasonable cause. As well might she assume to leave her husband because some other woman made uncomplimentary remarks about his personal appearance. See Mayne on Damages, 6th ed., pp. 47, 48, 63.

BRITTON, J.—The motion should be dismissed solely upon the ground that the special damage claimed, and which plaintiff was prepared to prove at the trial, namely, that plaintiff's wife left him, and that Olive Batson ceased to board with him, on account of the words complained of, are too remote. It cannot be said that such words, falsely spoken by friend or foe, are likely to cause, as a natural or reasonable result, the separation of husband and wife or the loss of a boarder. *Lynch v. Knight*, 9 H. L. C. 600, discussed. The consequences alleged could not fairly and reasonably have been anticipated or even feared. As the point upon which the defendant now succeeds was not taken at the trial, or in the statement of defence, there should be no costs of this motion.

Motion dismissed without costs.

MEREDITH, J.

JANUARY 20TH. 1903.

WEEKLY COURT.

RE DOUGHTY AND JOHNSON.

Will—Construction—Devise to Widow—Estate during Widowhood—Estate in Fee—Residuary Devise.

Motion under the Vendors and Purchasers Act by the vendor for an order declaring that she has a good title under the will of William Henry Johnson to lands in the county of Hastings. The vendor is the widow of the testator. At the time of his death he was possessed of the south-west quarter of lot 12, but by his will he devised (by mistake, as alleged) to the vendor the south-east quarter of lot 12. He devised other lands to his sons, and one parcel to the vendor during widowhood, and devised and bequeathed all the residue of his estate to the vendor.

F. E. O'Flynn, Belleville, for the vendor.

No one appeared for the purchaser.

MEREDITH, J.—Under the earliest clause of the will the widow took probably only an estate *durante viduitate* in the lands therein described, though it may perhaps be open to contention that the restriction contained in the words "so long as she remains my widow" does not apply to the gifts of the lands. But, however that may be, under the residuary clause of the will, together with the first clause, the widow took all the estate and interest of the testator, at the time of his death, in the lands in question. If, under the first clause,

an estate during widowhood only is conferred, that is enlarged by the residuary clause; and if, by reason of misdescription of one of the parcels mentioned in the first clause, no estate in it passed under that clause, that the residuary clause corrects. It gives, devises, and bequeaths to the widow all the residue of the testator's estate not in the will before disposed of. So, as to both parcels, the widow took title under the will subject to the payment of the just debts, funeral and testamentary expenses, and the legacy mentioned in the will.

BOYD, C.

JANUARY 21ST. 1903.

TRIAL.

LAMB v. SECORD.

Chose in Action—Assignment of Legacy—Rights of Assignee for Creditors of Legatee—Interpleader.

Interpleader issue, tried at Hamilton. The plaintiff, F. H. Lamb, as assignee for the benefit of creditors of one Lawrason, affirmed, and the defendant, Melvin A. Secord, denied, that the plaintiff was entitled as against defendant to \$1,-226.78 paid into Court in an action by the plaintiff against the executors of the will of Thomas W. Thompson to recover that sum as a legacy to Lawrason, the defendant also claiming the amount by virtue of another assignment.

A. B. Aylesworth and W. S. McBrayne, Hamilton, for plaintiff.

S. F. Washington, K.C., for defendant.

BOYD, C., remarked that a more unsatisfactory case than this in every way he does not remember to have had. He had puzzled over it with the utmost care, but found it impossible to reach any conclusion with confidence. It would take too long to write out all the incongruities and contradictions to be found in the materials; but, in brief, the least unsatisfactory result was to support the assignment of the legacy to defendant to the extent of \$500, and this much of the fund in Court is to be paid out to defendant, and the balance to plaintiff as assignee for Lawrason's creditors. The defendant to bear his own costs, and the plaintiff to get his out of the fund or estate.

MEREDITH, J.

JANUARY 22ND. 1903.

CHAMBERS.

RE KEATING.

Will—Legacy—Direction for Payment at Age of Twenty-five—Right to Receive at Majority—Declaration—Summary Application for.

Application by Charlotte Brown Wallbridge for an order directing the Toronto General Trusts Corporation to transfer

to the applicant her share of the estate of James Keating, late of the township of Enniskillen, deceased, the corporation being the executors and trustees under the will of the deceased. The applicant was 22 years of age, and under the residuary clause of the will she was not entitled to her share until she arrived at the age of 25.

A. B. Clute, for the applicant.

J. B. Holden, for the corporation.

MEREDITH, J.—This is not the proper method of enforcing a claim. But it may be proper for the executors to obtain in this manner the advice or opinion of the Court, by motion in Chambers. Dealt with in that way, all that can be said is, that, if the applicant is entitled absolutely to the specific sum of money in question in any event, and is of age and otherwise competent to give a release of her right, the executors may pay over to her the money, notwithstanding that she has not attained the age of 25 years. Nothing more definite can be said without considering the whole will, which was not before me. Probably nothing more definite is desired; but, if so, it must be sought in the usual and regular manner.

MACMAHON, J.

JANUARY 22ND, 1903.

TRIAL.

LONDON STREET R. W. CO. v. CITY OF LONDON.

Street Railways—Extension of Lines—Municipal By-laws—Changes in Lines—Validity—Mandatory Order—Injunction—Meeting of Council—Resignation of Member—Sufficiency of Resolution Accepting—Filling Vacancy under Statute.

Action tried without a jury at London. Action to have it declared that by-laws 2099, 2100, and 2101, passed by the council of defendants on the 21st July, 1902, are invalid, and for an injunction restraining defendants from enforcing any of such by-laws; also for a mandamus to compel the mayor of the defendants to sign and execute by-law 2083 passed on the 23rd June, 1902. This by-law was passed in accordance with a resolution of the council of the 29th April, 1902, authorizing the plaintiffs to extend their tracks on certain streets in the city. The plaintiffs did work on the strength of this by-law and resolution. By the subsequent by-laws the routes were changed and obligations imposed upon plaintiffs.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for plaintiffs.

T. G. Meredith, K.C, for defendants.

MACMAHON, J., held that by-law 2083, not having been signed by the mayor, who was the presiding officer at the meeting at which it was passed, was inoperative: R. S. O. ch. 223, sec. 333; Canada Atlantic R. W. Co. v. City of Ottawa, 12 S. C. R. 379; Wible v. Village of Kingsville, 28 O. R. 378. Until a by-law was passed and formally accepted by plaintiffs by an agreement binding on them, they were acting without authority in building a line of railways and running cars thereon. The plaintiffs were, therefore, not entitled to the mandatory order asked for to compel the mayor to sign the by-law.

The plaintiffs asked leave to amend so as to claim, in the alternative, a mandamus to the council to pass a by-law in accordance with the resolution of 29th April. It was urged that, as the council had passed the resolution providing for the building by the plaintiffs of the new lines, and as the plaintiffs had proceeded with and built some of the lines in accordance with the resolution and with the sanction of the city engineer, who furnished the grades for the lines on Beaconsfield avenue and Woodley road, the defendants were bound. It was held, however, that the engineer could not bind defendants by giving the grades; the manager of plaintiffs obtained the grades from the engineer, and proceeded with the building of the lines, taking his chances of the resolution being ratified by by-law. The amendment should not be allowed, as, upon the facts, plaintiffs are not entitled to a mandamus.

It was also held that the council had authority to pass by-law 2099, changing and varying the routes, and by-law 2100, regulating the speed and service of the cars on the various routes, was also valid. As to by-law No. 2101, requiring plaintiffs to lay down a new line and extend the existing lines to the extent of 7,380 feet of track, it was held that, having regard to the taking into the city of London of the village of London West, with its additional street railway mileage, the defendants are not entitled to all the tracks mentioned in by-law No. 2101, and that by-law is bad.

Upon one question arising in the case, judgment was given as follows:—

The mayor, on the 21st June, 1902, caused a special meeting of the council to be summoned to consider the street railway by-law, 2083, at which meeting the by-law as amended was (under the emergency clause of the city's by-laws) read a first, second, and third time. The by-law was carried by a vote of six yeas to five nays, Alderman Pritchard voting with the yeas.

Council for the city urged that the by-law was not duly passed because John H. Pritchard had been declared entitled

to succeed to the office of alderman, and had taken the declaration of office and had voted as a member of the council before a majority of the members of the council present had consented to the acceptance of the resignation of Alderman Beatty being received.

At that meeting, on the 21st June, the mayor announced that Alderman Beatty had placed in his hands his resignation as a member of the council. The resignation was then read and filed.

The city clerk thereupon stated that in accordance with the statute of 1901 Mr. John H. Pritchard, being next in succession to the office, had taken the necessary declaration of qualification and of office.

On the minutes of the council, and immediately after the above statement of the city clerk, appears the following: "Alderman Campbell, seconded by Alderman Winnett, moved that this council hereby places on record its high appreciation of the services rendered by Alderman Beatty to his fellow citizens while a member of this council, and that upon the occasion of his resignation as such member we now wish to convey to him our sincere desire for his future welfare and happiness."

"Carried by standing vote of the members."

This is, I consider, a sufficient compliance with the requirements of sec. 210 of the Municipal Act. R. S. O. ch. 223, which provides that "any mayor or other member of the council may, with the consent of the majority of the members present, to be entered on the minutes of the council, resign his seat in the council."

The resolution refers to Alderman Beatty as having been a member of the council, of his having resigned his seat, and it is carried without a division. This is an ample consent by the council to the resignation: see Biggar's Municipal Manual, p. 228.

Judgment for plaintiffs declaring that by-law 2101 is invalid and of no effect. Judgment for defendants declaring that by-laws 2099 and 2100 are valid and subsisting by-laws, and awarding defendants a mandatory order (asked for in their counterclaim) compelling plaintiffs to run their cars in accordance with the provisions of the by-laws, and compelling them immediately to replace the tracks and works illegally removed from Rectory street, restraining them from running their cars on Beaconsfield avenue and Wortley road, and compelling plaintiffs to remove their tracks and works from these streets. Plaintiffs to have so much of the costs of the action as relate to by-law 2101; and defendants to have the costs of the action except those relating to by-law 2101.

WINCHESTER, MASTER.

JANUARY 22RD, 1903.

. CHAMBERS.

MERCHANTS BANK v. IRVINE.

Summary Judgment—Action on Promissory Notes—Defence of Fraud—Notice—Costs of Motion where Dismissed.

Motion by plaintiffs for summary judgment under Rule 603. The defendants alleged that the promissory notes sued on were obtained by fraud, and that they notified the plaintiffs of this fact shortly after the dates of the notes, and previous to the full payment of the proceeds by them to their customer for whom they discounted the notes.

G. L. Smith, for plaintiffs.

W. E. Middleton, for defendants.

THE MASTER held, on the facts disclosed by the cross-examination of parties on their affidavits, that the action must go to trial; also, that the motion should not have been made in view of *Farmer v. Ellis*, 2 O. L. R. 544, and *Fuller v. Alexander*, 47 L. T. N. S. 443, and the costs of the motion other than of the examinations should be costs to defendants in any event. The examinations to be considered as examinations for discovery, without prejudice to further examinations after pleadings are delivered if the parties so desire.

MEREDITH, J.

JANUARY 22RD, 1903.

CHAMBERS.

RE WILLIAMS.

Will—Construction—Bequest to "all my Children"—Representatives of Deceased Child.

Motion by James Ailles, one of the executors of the will of Arscott Williams, for an order construing the will and determining whether Bertram E. Webster, Henry A. Webster, Ida M. Webster, and Ernest E. Webster (an infant), the children of Annie Webster, who was a daughter of the deceased and died before the execution of the will, are entitled between them to a one-fifth share or interest in the estate of the deceased, under his will, as the heirs of their mother. The testator died on the 26th June, 1893. The will, so far as material, was as follows: "I direct that after my death all my property, real and personal, of whatsoever nature and wheresoever situated, be sold as soon as may be done without loss, in the opinion of my executors, and that the proceeds be invested for the sole and only benefit of my wife during her lifetime. I direct that after her death the principal money so invested be divided amongst all my children in

equal parts." The widow died on the 21st January, 1899. The testator had five children, all of whom but Annie Webster, were living.

D'Arcy Tate, Hamilton, for executor and children of testator.

T. Hobson, Hamilton, for adult grandchildren of testator.

F. W. Harcourt, for infant grandchild.

MEREDITH, J., held that, the testator's words being plain, there being no ambiguity, patent or latent (*Higgins v. Dawson*, [1902] A. C. 1), the grandchildren cannot take directly. Nor can they take under sec. 36 of the Wills Act of Ontario: see *In re Harvey*, *Harvey v. Gillow*, [1893] 1 Ch. 567, and *In re Coleman and Jarrom*, 4 Ch. D. 165. *In re Smith's Trusts*, 5 Ch. D. 497 n., distinguished, and doubted in view of *In re Musther*, *Groves v. Musther*, 43 Ch. D. 569. The gift (as a question of interpretation of the will) must be held to be to persons capable, or at least supposed to be capable, of taking. No one, with or without a knowledge of the Act and of such cases as *Mower v. Orr*, 7 Hare 483, would make a gift to a dead person in order that his child or children might take; the gift would be to the child or children, or child or children, if any; and the word "all" has no contrary signification. *Christopherson v. Naylor*, 1 Mer. 320, referred to. The dead child is not included in the words "all my children," and so her children take nothing under the will. Order accordingly; costs out of the estate as usual.

JANUARY 23RD, 1903.

DIVISIONAL COURT.

COBBAN MFG. CO. v. LAKE SIMCOE HOTEL CO.

Mechanics' Liens—Judgment for Defendant in Action to Enforce—Costs—Percentage on Sum Claimed.

Appeal by plaintiff from the judgment of the Judge of the County Court of Simcoe in an action to enforce a mechanics' lien for work done and materials supplied in repairs and improvements to a hotel in the town of Barrie. The plaintiffs claimed \$277.85, \$57.85 being for extras outside the contract. The Judge disallowed the extras and deducted a sum for incomplete work, and therefore found that there was nothing due to plaintiffs, and gave judgment for defendants with costs. The plaintiffs appealed as to the extras and the deductions, and also contended that the defendants' allowance for costs should be based upon the amount claimed by the

statement of claim by which the action was begun, and not upon the amount claimed in the lien registered, there having been a payment of \$800 after lien registered, and before statement of claim.

J. A. Worrell, K.C., for plaintiffs.

A. E. H. Creswicke, Barrie, for defendants.

THE COURT (MEREDITH, C.J., and FALCONBRIDGE, C.J.) dismissed the appeal with costs, upon a consideration of the evidence, but varied the judgment by limiting defendants' costs to 25 per cent. of the amount claimed by the statement of claim.

JANUARY 23RD. 1903.

DIVISIONAL COURT.

RE HOOKER AND MALCOLM.

Landlord and Tenant—Overholding Tenants Act—Right of Landlord to Re-enter for Non-payment of Rent—Set-off—“Clearly.”

Motion by the tenants to set aside a summary order of the Judge of the County Court of Brant, under the Overholding Tenants Act, awarding possession of demised premises to the landlord, on the ground that the lease under which the tenants were in possession had not expired or been determined at the time the proceedings were taken under the Act. The tenants were in originally under a lease for six months, and continued in possession after its expiry, paying rent. The landlord gave notice to quit, but served a demand of possession, claiming the right to re-enter for non-payment of rent.

L. F. Heyd. K.C., for the tenants contended that no rent was due because they had a set-off, and that it was not necessary that the set-off should be undisputed; it was sufficient to oust the jurisdiction under the Overholding Tenants Act, that there should be a bona fide assertion of the right to a set-off.

W. S. Brewster, K.C., for the landlord, contra.

THE COURT (MEREDITH, C.J., and FALCONBRIDGE, C.J.) held that the case was “clearly one coming under the true intent and meaning” of sec. 3 of the Act, as it clearly appeared that there was rent due at the time when the landlord claimed to enter. Motion dismissed with costs.

OSLER, J.A.

JANUARY 24TH, 1903.

TRIAL.

CLERGUE v. PRESTON.

Amendment—Addition of Defendant after Trial—Specific Performance—Terms—Parties.

Motion by plaintiff (heard at Sault Ste. Marie as if at the trial) for leave to amend by adding one Heath as a party defendant. The case had been tried out. There was great delay in proceeding with the action, the writ not having been served until a year after its issue had all but elapsed. No application to amend was made at the trial, although the objection to Heath's absence from the record was taken there.

N. Simpson. Sault Ste. Marie, for plaintiff.

W. H. Hearst, Sault Ste. Marie, for defendants.

OSLER. J.A.—Prima facie Heath is not shewn to be a purchaser pendente lite, as his deed is dated prior to the issue of the writ, and, even if it was not executed till the 29th May (the date of swearing the affidavit of execution, as well as that of the issue of the writ), it may have been actually prior in point of time to the latter act. There appears, however, to have been some business connection between Heath and defendant Preston, and it is not unreasonable on the whole that plaintiff should have leave to prove, if he can, that the former had actual notice of the alleged contract between Preston and plaintiff, specific performance of which is sought in this action, or that it was not made for valuable consideration, or was in fact made pendente lite. Heath's presence in the action would be necessary in any event, as he is the holder of the legal estate. As a condition of the relief, plaintiff must pay Preston's costs of the trial at Sault Ste. Marie, and he must determine within two weeks whether he will amend on these terms. If the parties desire it the case will be tried out when ripe for trial against Heath. If leave to amend is not accepted, the action will be disposed of on that being intimated to me. The defendant Annie McKay should not have been made a party, and as against her the action may now be dismissed with costs.

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(TO AND INCLUDING JANUARY 31ST, 1903.)

VOL. II. TORONTO, FEBRUARY 5, 1903. No. 4.

BURBIDGE, J.

JANUARY 26TH, 1903.

EXCHEQUER COURT.

ATLANTIC AND LAKE SUPERIOR R. W. CO. v. THE KING.

Security for Costs—Petition of Right—Company—Crown— English Companies Act.

Application by the Crown for security for costs of a petition of right.

E. L. Newcombe, for the Crown.

W. D. Hogg, K.C., for the suppliants, referred to Colwell v. Taylor, 31 Ch. D. 34; Cook v. Whellock, 24 Q. B. D. 658; Dartmouth Com'rs v. Dartmouth, 34 W. R. 774; Wallbridge v. Trust and Loan Co., 13 P. R. 67; Major v. McKenzie, 17 P. R. 18.

BURBIDGE, J.—This is an application on the part of the respondent for security for costs, on the ground that there is reason to believe that if the respondent is successful in the defence the assets of the suppliant company will not be sufficient to pay his costs.

The application is based upon sec. 69 of the Companies Act, 1863 (U. K. 25 & 26 Vict. ch. 89), which, it is argued, is in force as part of the practice and procedure in this Court under sec. 21 of the Exchequer Court Act and the Rules of Court (see Audette's Practice. p. 217, Rule 1), which provide that the practice and procedure in the Exchequer Court shall, so far as they are applicable and unless otherwise provided for, be regulated by the practice and procedure in similar suits, actions, and matters in the High Court of Justice in England. The case is not otherwise provided for; but the proceeding being by petition of right, it is necessary in the first instance to see what the practice is in England in such a proceeding. By sec. 7 of the English Petition of Right Act (23 & 24 Vict. ch. 34) it is, among other things, in effect

that the laws and statutes and the practice and procedure in force as to security for costs in suits and personal actions between subject and subject unless the Court otherwise orders, be applicable and extend to petitions of right. Under that provision the Crown may call upon the suppliant to give security for costs in any case in which, if it were an action between subject and subject, an order for security for costs would be made. The right of the Crown to obtain such an order is recognized in sec. 28 of the Exchequer Court Act.

So far no difficulty arises, and if the provision relied upon were a general rule applicable to all companies, or if it had been expressly made a rule of procedure in this Court, there would perhaps be no good reason against following it in this case; but it is not a general rule applicable to all companies, but only to "limited companies" within the meaning of that expression as used in the section referred to; and while it is a provision which relates to practice and procedure in the case provided for, it is a provision that affects substantive rights. It constitutes a limitation upon the right which limited companies otherwise would have to bring actions or proceedings in the Court upon the same terms as individuals or other companies.

Then the provision occurs in a statute relating to companies and not in one dealing principally with procedure or practice in the Courts; and, while too much weight should not be given to that consideration, and none of the others may be absolutely conclusive against the contention set up for the respondent, the matter does not, on the whole, appear to be sufficiently free from doubt to justify the granting of the application.

The application should, I think, be refused, with costs in any event, to the suppliants to be allowed or set off, as the case may be.

JANUARY 26TH, 1903.

C.A.

WILSON v. HOWE.

Limitation of Actions—Claim against Estate of Deceased Person—Corroboration—Special Agreement with Deceased—Terms of Credit.

Appeal by plaintiff from judgment of BRITTON, J., (1 O. W. R. 272) dismissing the action, which was brought by plaintiff to recover from defendants, as executors of Marvin Howe, the amount of an account alleged to have been owing by Marvin Howe to the plaintiff for work done and materials sup-

plied, and also to recover other small claims against defendants personally and as executors. The trial Judge found against the plaintiff on these latter claims, but in his favour as to \$450 for blacksmithing work done and materials. This claim, however, he held to be barred by the Statute of Limitations, and dismissed the action.

J. P. Mabey, K.C., for appellant.

J. Idington, K.C., for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, J.J.A.) was delivered by

GARROW, J.A.—The only question involved in this appeal relates to plaintiff's claim for work done and goods supplied upon what is called "the running account" against the late Marvin Howe, all other claims having been abandoned by his counsel on the argument of the appeal. . . . The account is made up of a general blacksmith's account and of articles of agricultural machinery supplied by plaintiff from time to time to deceased. I may say at once that, after a careful perusal of the evidence, I can see no sufficient reason for making a distinction between the blacksmith's account and the articles supplied. . . . In my opinion the account must be dealt with as a whole, and the bar of the statute applied, if it is to be applied, to the whole, and not to a part only, of the account. Nor do I think the agreement set up by plaintiff one which offends against the law relating to frauds upon creditors, as contended by defendants' counsel, even if defendants had put themselves in a position to raise such a question, by pleading it, which they did not: *Day v. Day*, 17 A. R. 157. . . .

I see no room upon the evidence to seriously doubt the learned Judge's conclusion that the work and services and the goods in question were actually supplied by plaintiff to deceased, and that they have not been paid for. . . . The action was begun on the 4th May, 1901. Marvin Howe died on 17th March, 1895, and probate of his will was granted to defendants on 5th April, 1895. . . . The plaintiff was married to a daughter of deceased, and commenced business after his marriage in April, 1888. He began on a small capital said to have been only about \$200. Early in his business career the deceased, who was a customer of plaintiff, proposed that plaintiff should keep the account against deceased separate from his other accounts, that he should try, if possible, to get on without it, and to leave it in the hands of deceased—the deceased saying, "I will save it for you and put it in a house," and that he would give the house to either plaintiff or his wife, and to this proposal plaintiff apparently acceded.

He kept the account by itself in separate books, produced at the trial, and he never rendered the account or demanded payment from the beginning in 1888 till he sent in the account to defendants' solicitor on 16th May, 1895. . . .

With reference to the question of corroboration, there is, in my opinion, sufficient and indeed ample corroboration of plaintiff's account of the matter. There is no necessity in law to corroborate each and every item of the account, or each and every material term of the special contract between the parties. All that is necessary is, to shew by some evidence in addition to plaintiff's that his statement of the matter is true or probably true: *Radford v. Macdonald*, 18 A. R. 167; *Green v. McLeod*, 23 A. R. 676.

Now, there is no reasonable doubt about the fact that Marvin Howe dealt with plaintiff from 1888 till his death in 1895, and that his account from the beginning was kept in a separate book or books. Both the general and the separate books were produced at the trial and before us, and this fact is apparent. Some explanation of this unusual condition is at once naturally sought, and is found, I think, in the depositions of the plaintiffs and his wife, the latter stating that "father said to put the account separate into a small book, not in a large book—if my husband got into trouble he could have this." "Father said he would keep the money until the house was bought." And Samuel Holmes, called for the plaintiff, says that deceased told him about a year and a half before his death that he had requested plaintiff to keep the account between them in a little book at home, not in the regular day book, so if anything happened the account would not go into the wholesale men, and that he intended to buy a house for plaintiff's wife. And similar evidence, although less distinctly, was given by the witness Woods. So that, upon the whole evidence, it appears to me that plaintiff's account of the matter is sufficiently corroborated even without the evidence of his wife. But I do not understand the learned Judge to have disbelieved either plaintiff or his wife. On the contrary, he appears to have accepted both as credible witnesses, and to have treated the case as failing because no definite agreement for credit was proved, or, if proved, sufficiently corroborated. . . . The real question is, was there credit given at all, upon any terms, definite or otherwise, and I think there clearly was, and therefore plaintiff could not have sued Marvin Howe successfully until the term of that credit, whatever it was, had expired, or in some way been determined. The statute begins to run from the breach, not from the promise: *East India Co. v. Raul*, 7 Moo. P. C. 85.

Then, if the dealings between the parties were upon a footing of credit instead of cash, even if the actual term of

such credit is not clear upon the evidence, a demand of payment would, I think, be necessary before action. Such a demand would seem to be involved as a necessary or implied term in the contract, which is practically one to pay upon request, just as in the case of money sued for as paid in mistake: see *Freeman v. Jeffries*, L. R. 4 Ex. 189.

But, in my opinion, the plaintiff is not obliged to rest upon an implied promise to pay upon request. If his story is believed and accepted, as I think it should be, there was an express agreement between them that Marvin Howe was to hold the money at least till the plaintiff demanded it. It did not and could not, having regard to this agreement, have become due and payable until so demanded, with the result which I think inevitable, that, as there was no demand proved prior to 16th May, 1895, the action was in time, and, therefore, that the appeal must be allowed, and judgment granted in plaintiff's favour for the amount found to be owing, with interest, and with costs in this Court and the Court below.

JANUARY 26TH, 1903.

C.A.

RE CITY OF KINGSTON AND KINGSTON LIGHT,
HEAT, AND POWER CO.

Company—Sale to Municipality of "Works, Plant, Appliances, and Property"—Franchise or Value of Earning Power—Arbitration and Award—Ten per Cent. Addition.

Appeal by the company from an order of LOUNT, J., in Court (3 O. L. R. 637, 1 O. W. R. 194) dismissing an appeal by the company from an award.

R. T. Walkem, K.C., and J. L. Whiting, K.C., for appellants.

D. M. McIntyre, Kingston, for the city corporation.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

MOSS, C.J.O.—The main question in this appeal turns upon the proper construction of an agreement entered into between the company and the city corporation on the 14th July, 1896.

The City of Kingston Gas and Light Company was incorporated by Act of the Legislature of the Province of Canada. 11 Vict. ch. 13, with extensive but not exclusive rights with regard to the manufacture and supply of gas in the city of Kingston. Under sec. 35 of the Act, the company and its powers were to end at the expiration of 50 years, i.e., on the 3rd March, 1898.

In 1891, that company having in the meantime entered into an arrangement with the Kingston Electric Light Company for the purchase of its plant, an Act of the Legislature of Ontario, 54 Vict. ch. 107, validated the agreement and changed the name of the City of Kingston Gas Light Company to the Kingston Light, Heat and Power Company. By sec. 10 it was enacted that sec. 35 of 11 Vict. ch. 13 be repealed, thus extending the duration of the company. But it also placed a limit to its existence by providing that at any time from and after 20 years from the date of the passing of the Act (4th May, 1891), the city of Kingston should have the right to expropriate the works and property of the company in the manner specified. By this enactment the company was protected against compulsory parting with its works and property to the city until May, 1911. But in 1896 the company entered into the agreement now in question, by which it gave to the city a new right to acquire the works and property at an earlier period. The agreement is a lengthy instrument, dealing with several matters; but, as regards the acquisition of the property by the city, the substance of it is, that upon the city giving one year's notice previous to the 1st January, 1896, it should have the option of purchasing and acquiring all the works, plant, appliances, and property of the company, used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business.

The city having exercised its option, it was contended before the arbitrators, on behalf of the company, that in ascertaining the price to be paid by the city the arbitrators should allow for the value of the earning power, or franchise or rights of the company, under 54 Vict. ch. 107, or otherwise. The majority of the arbitrators held that the company was not entitled to any allowance in respect of this claim. Their decision was upheld by Lount, J., and the company has renewed its contention in this Court.

We think the arbitrators placed the correct construction upon the agreement. What the company asks is, in effect, that it shall be compensated for the termination of the right which, but for the agreement, it would have of carrying on the business until 1911. That is to say, the company is claiming, not merely the price of the works, plant, appliances, and property of the company used for light, heat, and power purposes, but this price and the price of something else in addition.

No objection has been taken to the amount allowed as the price of the works, plant, appliances, and property, and we

must assume that, after due consideration of their value, having regard to their purposes and use, there was fairly allowed for them all that should have been allowed. But the company seeks to add to the sum so allowed something as the value of the earning power which these works, plant, and property might have in its hands if retained until 1911. There is no language in the agreement to justify this contention.

The company claims that the right which is thus ended by the agreement is a franchise, and passes under the term "property." But it is manifest that the word is not used in its widest sense—and it was not the intention of either party that it should be so read. Its meaning is restricted by the words which precede it, as well as by those which follow it. It was evidently not intended to comprehend everything the company possessed. The so-called franchise is no more included in the word "property" than the money in the bank, or the book debts or assets of a like nature, belonging to the company. It is far from clear that the company parted with anything in the nature of a franchise which it would be of any value to the city to acquire. The company could not, and did not, part with its corporate franchise. The privilege of using the streets for the purposes of the business ended naturally with the purchase of the works, plant, appliances, and property; and it was not needful for the city to acquire either one or the other to enable it to carry on the business.

A good deal was said in argument about the justice of the city paying for all it acquired under the agreement; but the real question on the construction of the agreement is, for what did the city agree to pay? And upon this question the arbitrators came to the proper conclusion.

The appeal also fails as to the claim to add 10 per cent. to the amount of the price found by the arbitrators. There is nothing in the agreement, or in the circumstances, to warrant the arbitrators dealing with the case as one of expropriation under the statute. And, doubtless, the arbitrators in arriving at the price took all the circumstances into consideration, and made every reasonable allowance.

The appeal should be dismissed.

JANUARY 26TH, 1903.

C.A.

McKAY v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Speed of Train in Town—Fences—Warnings—Statutory Provisions—Findings of Jury.

An appeal by defendants against the judgment for plaintiff at the trial before MACMAHON, J., and a jury.

The action was for negligence in the operation of an engine and passenger train at a crossing over Main street, in the town of Forest, on the evening of 9th October, 1901.

On the evening in question, about 6 o'clock, the plaintiff, a farmer, with his wife and two very young children, was driving home from an agricultural fair at the town of Forest, which they had been attending. The evening was rather wet, and the plaintiff had, in consequence, put up the sides of the covered buggy in which he and his family were driving, which interfered to some extent with his seeing and hearing. He left the hotel on King street, drove to Main street, and then along Main street to the crossing where the collision took place by which the plaintiff himself was severely injured, his wife and two children were killed, and his horse and buggy destroyed. The track crosses Main street, a leading street in the town, on the level, and is not protected by any gate or by a watchman; although on the day in question one Hallisey, employed by the town corporation, was stationed at this crossing as watchman, owing to the number of people who would probably cross to attend the fair. Hallisey saw plaintiff approaching. He knew the train was about to cross, and he called out to warn plaintiff of his danger, but without effect. Others also called out to plaintiff to beware of the approaching train equally without effect; plaintiff's explanation in the witness box being that he heard none of these warnings. Plaintiff said he looked to see if the train was in sight, and could not see it. He also said he heard no warning whistle nor the ringing of the bell. The evidence was clear and distinct that the plaintiff could have seen the approaching train for at least a distance of 40 feet before he reached the track in question, and if he looked he must have looked too soon or imperfectly, and there was no doubt that for at least 8 or 10 rods before the crossing the bell was rung, and the whistle was also sounded at what was called the whistling post. The plaintiff did not stop and listen, but drove on in a hurry to get home to his farm, as he said, and knew nothing about the approach of the train until the moment of the collision.

The jury, after a very fair and full charge, practically unobjected to by either counsel, except upon one point, found that the whistle was blown at the whistling post, the bell commenced to sound 8 or 10 rods east of Main street, and rang continuously; that Main street crossing is in a thickly peopled portion of the village; that the engine was proceeding at a speed of 20 miles an hour; that such speed was a dangerous speed in that locality; that the death of Mrs. McKay and the injury to plaintiff were caused by the negligence of the defendants in running too fast, and by reason of

the want of a flagman or gates; that no sufficient warning was given to plaintiff in time to have enabled him to have avoided the accident; and that plaintiff was not guilty of contributory negligence; and they assessed the damages at \$1,300 in all, namely, \$800 for the death of the wife, \$400 for plaintiff's own injuries, and \$100 for the horse and buggy.

W. R. Riddell, K.C., for appellants.

I. F. Hellmuth, K.C., for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

GARROW. J.A.—Counsel for the defendants objected, not so much to the charge as to one of the questions, as follows: "Mr. Riddell . . . Then I object to the question of the rate of speed being a dangerous rate for the locality. I object to that being put to the jury. I do not know that it will have any great effect on the verdict one way or the other, but I submit that is a question that they should not be asked." His Lordship: "How would you frame it?" Mr. Riddell: "I would not risk it at all. It is not the phraseology I object to. However, that is a question probably more of law than of fact."

I can see no force in the objection thus rather faintly urged; on the contrary, the question was, I think, a perfectly proper one to submit to the jury; and in any event if it is, as the learned counsel seemed to think, matter of law rather than of fact, it cannot have affected the result. The main question in this appeal arises upon the contention of the defendants' counsel that where the railway track is fenced in accordance with the statute, the maximum speed is not limited to six miles an hour at such crossings as the one in question; and that to fence according to the statute is simply to fence to the cattle guard at the side of the crossing, and to turn in the fence to such cattle guard, leaving the sides of the track where it crosses the highway wholly open, unprotected, and free of access by any one passing along the highway, and that any additional restriction upon the rate of speed must be secured by an application to and an order by the Railway Committee of the Privy Council under the Railway Act.

The statutory provisions seem to be as follows. By the Railway Act, 1888, 51 Vict. ch. 9, sec. 197, it was provided that at every public road crossing a railway at the level, the crossing is to be sufficiently fenced on both sides, so as to allow the safe passage of the train. By 55 & 56 Vict. ch. 27, sec. 6, this section 197 was repealed, and a new section substituted, which reads as follows: "At every public road cross-

ing at rail level of the railway, the fence on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." Then by the Railway Act, 1888, sec. 259, it was further provided that "No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is properly fenced." This also was repealed by 55 & 56 Vict. ch. 27, and a new section substituted, the only change thus made consisting in the substitution of the words "unless the track is fenced in the manner prescribed by this Act," for the words in the former section, "unless the track is properly fenced."

Under the law as it stood before the amendment of 55 & 56 Vict. ch. 27, protection was secured by directing, in plain words, that the track should be "properly fenced;" otherwise the speed of the train was not to exceed six miles an hour in such places. "Properly fenced" had the same meaning, I take it, as efficiently fenced, to accomplish the purpose intended, and must, therefore, have included and been intended to include the crossings themselves, the only points at which collisions were reasonably to be expected to occur, and not merely the side fences along the railway, which end at the crossings. The language of the new section is not by any means as clear and as easily understood as that contained in the old; but the purpose and avowed intention is apparently the same, namely, to allow the safe passage of the train at these crossings; and safe passage, of course, must include safe for the crossing public as well as for the passing train. No one in crossing the track would be likely to attempt to cross the cattle guards which are so placed as to be completely out of line of ordinary travel, so that the new direction to turn the fences in to the cattle guards is obviously not intended to keep back or protect people crossing the railway track, although fences so turned in would prevent cattle and horses from straying upon the track at these crossings, and that may have been the object of the change. But, whatever was its object, it appears to me impossible to read it as defendants' counsel contends, as giving to railways a right to cross highways in thickly populated centres at any speed they may choose, provided they have turned in the fences to the cattle guards, leaving the highway as it crosses the track wholly open and unprotected. This contention, if successful, would render senseless sec. 259. The object of that section plainly is one of protection at the crossings; such protection can only be secured against rapidly moving trains, by fencing or some similar protection; and such fencing must, to be any protection at all, cross the highway at the crossing and so retain

the travelling public in a place of safety while a train is passing or immediately about to pass.

There is, of course, another view. By the new section 259 the Legislature clearly intended a fence of some kind to be maintained, and as clearly intended that if no fence was maintained at these crossings then the speed should not exceed six miles an hour; but it has perhaps failed to prescribe the kind of fence which shall be built, because it is clear that a fence leaving the crossing itself entirely open, such as that apparently prescribed by the new sec. 197, could not possibly meet the case of protecting the crossing, and no other fence is specifically prescribed, so far as I can find, in the railway legislation of the country. Now, in such a condition of things, and from this point of view, the railway company has one of two courses open. It may at such crossings station a watchman or maintain a reasonable fence sufficient for the purpose, or it may reduce its speed to the permitted maximum of six miles an hour. The defendants do not choose to adopt either course. They say, in effect, the sections in question, as they now stand in the Railway Act, are not at all intended for the protection of the public, but solely in the interests and for the protection of the railway companies; and that they, the railway companies, are subject only to the orders and directions of the Railway Committee as to such crossings as the one in question. But not even the Railway Committee has power to authorize a speed exceeding six miles an hour, unless the track is "properly fenced:" see sec. 10 of the Railway Act, 1888; the retention of the latter words, "properly fenced," aiding, I think, very materially in the conclusion which I have reached, namely, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveller while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns, and villages, is six miles an hour.

So that we have in the present case an undisputed finding by the jury that the train in question was travelling at what, if I am right, was the unlawful and highly dangerous speed of 20 miles an hour over a main street in an incorporated town, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part. I am of the opinion that there was evidence, I am inclined to think strong evidence, of contributory negligence on plaintiff's part; and if the jury had found against him on that question I would certainly not have interfered. But while not yet laid down as matter of law that a person approaching a crossing is bound to stop, look, and listen, he is of course

bound to exercise his senses, and to act with reasonable care. The plaintiff says he did look and did not see the approaching train, that he heard no warning of any kind, and he had a right to assume not merely that the ordinary statutory warnings would be given, such as ringing the bell, and blowing the whistle, but that the speed of the train at the crossing in question would be a lawful speed, in which latter event he could probably have escaped from the collision, notwithstanding his own previous want of care. The whole matter was one, in my opinion, which could not have been properly withdrawn from the jury, and the appeal therefore fails.

JANUARY 26TH, 1903.

C.A.

WEBB v. OTTAWA CAR CO.

*Contract—Novation — Consideration — Collateral Promise —
Oral Evidence to Alter Writing.*

Appeal by the third party Campbell from the judgment of a Divisional Court (1 O. W. R. 90) holding him liable to pay to the defendants the amount for which they were held liable to the plaintiff. The plaintiff sued and recovered judgment against the defendants for a claim for certain brick work done in and about the installation in a boiler house belonging to the defendants of certain boilers which were supplied and put in place by Campbell. The defendants, claiming that Campbell was liable to indemnify them, caused him to be brought in as a third party.

LOUNT, J., by whom the action was tried without a jury, held that Campbell was not liable to the defendants. Upon appeal the Divisional Court was of the contrary opinion.

J. Bishop, Ottawa, for appellant.

W. H. Blake, K.C., for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ A) was delivered by

MOSS, C.J.O.—I am of opinion that the decision of the Divisional Court ought to be affirmed.

Some time before the brick work in question was done. Campbell had, under contract with the defendants, put in certain boilers spoken of as Kingsley boilers, and, these not proving satisfactory, he bound himself to the defendants to put in other boilers free of charge to them. This agreement is in writing in the form of a letter and acceptance dated the 27th December, 1899. By that agreement he undertook to replace the Kingsley boilers by others of the same capacity

to do the work, the "alterations or changes to be done free of charge" to the defendants.

He now seeks to shew by parol that the words "free of charge" did not refer to the brick work which formed part of the installation of the new boilers, and without the doing of which they could not be placed in working order. It is not pretended that under ordinary circumstances the replacing of the Kingsley boilers would not mean the doing of the brick work as well as the other work, but it is sought to be shewn that before the writing was signed by Campbell it was understood and agreed that he was not to bear the cost of the brick work, but that defendants were to have it done, Campbell giving them or allowing them to use the old bricks connected with the Kingsley boilers.

To allow the parol evidence for this purpose would be to sanction its receipt for the purpose of varying, qualifying, adding to, or subtracting from, the contract which the parties have put in writing. Campbell's undertaking is plainly expressed. If he could not make the Kingsley boilers satisfactory, that is, to perform their work to the defendants' satisfaction, he would replace them by others capable of doing the work, free of charge to the defendants. It is urged that the parol evidence was not objected to at the trial, and, having been received there, it cannot now be objected to. While that seems to be the general rule where there is a trial with a jury, a different rule is recognized where there is a trial by a Judge without a jury: *Jaekers v. International Cable Co.*, 5 Times L. R. 13; *Phipson's Law of Evidence*, p. 9.

Campbell having rendered himself liable in that way, what, if anything, afterwards transpired to relieve him, of that liability?

He complains that the defendants, through their vice-president and managing director, Wylie, assumed to make the plans, engage the plaintiff, and direct the doing of the brick work in question. There appears to be some good reason for that course, inasmuch as there was a good deal of work to be done beyond the mere brick work for the boilers. An entirely new boiler house was being built, the expense of which the defendants were bearing, and the plans covered the whole work.

If Campbell was not satisfied with what was being done by the defendants, he might have protested against the work being taken out of his hands and notified the defendants that he was not to be held liable to pay for work which he was not allowed to provide for or superintend. He should

have insisted upon being allowed to take the matter into his own hands, and have made the defendants understand that unless he was allowed to do so he was to be relieved and discharged from liability for this part of the work. He did not take this course. Though he was aware of the work that was being done, all he did was to object to Webb that it was too heavy and expensive, and to go, accompanied by Webb, to the defendants' office to see if the plans could not be altered. This action was quite consistent with his considering himself liable; otherwise why interfere at all?

His liability to replace the Kingsley boilers, free of charge to the defendants continued notwithstanding the manner in which the brick work part was carried out. Neither by agreement or conduct on their part did the defendants discharge him from such liability.

Then, when the time came for settlement upon his contract with the defendants, the question of the payment for the brick work in connection with the new boilers was brought up, in consequence of Wylie having learned that Campbell had refused to recognize his liability to pay Webb, and that the latter was looking for payment to the defendants. A dispute arose, and the matter was compromised by the defendants agreeing to pay Campbell the whole of the \$962 balance of the contract and other work, and Campbell agreeing to pay Webb the amount of his claim, and this arrangement was put into writing and signed by Campbell. The compromise and the payment in pursuance thereof was sufficient consideration. But there was also the previous existing liability as between him and the defendants arising from his agreement to replace the boilers free of charge to the defendants.

Campbell testified that when he signed the paper of the 17th November, 1900, containing this arrangement, Wylie assured him that he would get the defendants to make an allowance in respect of the brick work, and that he signed on that condition.

In view of his existing liability, his signature to that paper was not necessary. But, whether or not that is so, his evidence shews that he understood the effect of the paper. What he now seeks to prove is inconsistent with its terms, but in any case all he proves is that, wisely or unwisely, he was willing to trust to Wylie's good offices with his co-directors and to take the money upon the terms stated in the writing.

The appeal should be dismissed.

JANUARY 26TH, 1903.

C.A.

RE PUBLISHERS' SYNDICATE.

PATON'S CASE.

Company—Winding-up—Subscription for Shares—Transfer of Shares by Old Subscriber to New Subscriber — Relief from Liability—Illegal Payment to Director.

Appeal by J. H. Paton and cross-appeal by liquidator from order of MEREDITH, C.J., varying judgment of Winchester, Official Referee, and settling the appellant on the list of contributories of the Publishers' Syndicate. The syndicate, finding that some of their shareholders were not in a financial position such that they could meet their liabilities upon unpaid stock, sent out their agents to procure subscriptions for stock, arming the agents with powers of attorney in blank or to themselves. One Moorehouse and one Brodie signed such powers of attorney authorizing one Stark, an agent, to "receive from the vendor" three shares and five shares respectively. Moorehouse subsequently signed a second document whereby he applied for three shares of stock in the company. The company allotted three shares to Moorehouse upon the application and allotted two shares to Brodie. These five shares were paid for in full to the company. Brodie subsequently paid three instalments of \$300 each in respect of the other three shares mentioned in the power of attorney. Some months afterwards the appellant, who was the owner of 30 shares in the company, upon which he had paid \$1,300, having had his attention called to the fact that Moorehouse's and Brodie's powers of attorney were pasted in the transfer book without any transfers opposite them, directed three of the shares standing in his name to be transferred to Moorehouse and two to Brodie, altering the accounts to make it appear that the moneys paid for the shares issued to these subscribers by the company were in fact paid for the purchase of shares from him, the appellant. It was held below that the appellant had no right, so long after the date of the powers of attorney, to take advantage of their form and procure the attorneys thereunder to accept shares standing in his name. Paton's appeal was taken upon the ground that there had been an absolute and formally regular transfer from the appellant to Moorehouse and Brodie, duly accepted by the attorneys of the latter. The liquidator of the company opposed the appeal, and cross-appealed in respect of three other shares transferred from the appellants to other persons under circumstances similar to those under which the transfers already referred to took place, in respect of the

mode in which the appellant should be charged on his shares, and in respect of a payment of \$300 authorized to be made to the appellant for his services to the company under a resolution of the shareholders, which sum was placed to the appellant's credit on his debt for unpaid stock. The liquidator objected to this payment on the ground that no services had in fact been performed, but the Judge below held in favour of the appellant.

E. B. Ryckman and A. T. Kirkpatrick, for Paton.

C. D. Scott, for the liquidator.

The judgment of the Court (MOSS, C.J.O.. MACLENNAN. • GARROW, MACLAREN. JJ.A.) was delivered by

GARROW, J.A.— . . . In my opinion, the evidence shews clearly that the real transactions between the company on the one hand and Moorehouse and Brodie on the other, were that the latter should become shareholders in the company and that the powers of attorney given by them were taken instead of ordinary applications for stock, at the instance of the company, under the mistaken belief that there was at that time no treasury stock to meet such applications, and that it would be necessary to receive transfers of shares which had been allotted to prior applicants who were unable to pay for them. Moorehouse and Brodie having paid the company for the five shares in question, and having received their stock certificates for them some time previous to the transfers from Paton, the latter could not relieve himself from liability by attempting to transfer his unpaid shares to these parties, when he did not and could not make them liable to the company for their payment. It may be noted that the motion for the allotment of the three company shares to Dr. Moorehouse was made at the meeting of the board by Paton himself.

It was strongly argued before us on behalf of Paton that he could transfer his unpaid shares, even although his object might be to escape liability, and that we should accept as conclusive the entries in the books. I do not consider the authorities cited to us on this point to be applicable to the present case. It was known to the company and to Paton that these applicants did not apply for or desire more shares than mentioned in the powers of attorney. After they had paid the company for and accepted certificates of paid-up shares in fulfilment of their contracts, Paton could not effectually transfer to them his unpaid shares without their knowledge or consent, and I do not think that the old powers of attorney could properly be used to accept transfers of these shares under the circumstances. In my opinion the judg-

ment appealed from is in this respect correct, and the appeal of Paton should be dismissed. . . .

The sum of \$300 was voted to Paton, and a like amount to each of the other provisional directors, for alleged services as such directors. It was done at what was called a joint meeting of shareholders and provisional directors. held for organization, sixteen days after the date of the letters patent, the provisional directors being the only shareholders at the time.

These directors were not servants of the company, but managers; and, apart from contract or agreement, could not claim remuneration for their services, so that such a payment would be in the nature of a gratuity, and should be authorized by by-law. Section 46 of the Ontario Companies Act, 1897, under which the company was incorporated, provided that no such by-law should be valid or be acted upon until it had been confirmed at a general meeting of the shareholders. I am of opinion that the resolution in question was not a sufficient compliance with this section, even although it formed part of the minutes which were read at the annual meeting held the following year, and which were confirmed in the ordinary way. It is further to be observed that no profits had been made at this time, and, according to the books, nothing had been paid in by any person on account of his stock. I think this case is clearly distinguishable from *Re Lundy Granite Co.*, *Lewis's Case*, 26 L. T. 673 (1872), to which we have been referred. There the payment in question was expressly authorized by the articles of association of the company. Here there is no such provision in the Act or the letters patent, and nothing to take it out of the general rule laid down by Lord Lindley in *Re George Newman & Co.*, [1895] 1 Ch. at p. 686, that the remuneration of directors for their trouble as such, even when authorized by the shareholders, can only be made out of assets properly divisible among the shareholders themselves, and not out of capital.

The liquidator has also appealed to this Court against the decisions . . . refusing to place Mr. Paton on the list of contributories with respect to nine other unpaid shares which he transferred to certain other persons . . . I am unable to find anything in the circumstances relating to these nine shares to place them on a different footing from the five shares transferred to Moorehouse and Brodie, and the same rule should be held to apply. •

The cross-appeal with respect to the \$300 and to these nine shares should, therefore, be maintained. and Mr. Paton

placed on the list of contributories for \$1,700. The liquidator to have the costs of this appeal and cross-appeal, and the costs below in respect of the cross-appeal.

JANUARY 26TH, 1903.

C.A.

FITZGERALD v. FITZGERALD.

Dower — Equity of Redemption — Conveyance of by Husband to Defeat Claim of Wife—Dower in Equitable Estate—Statute.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., dismissing without costs an action brought by the plaintiff, as widow of James W. Fitzgerald, against his son, and plaintiff's stepson, to recover dower out of certain lands conveyed by the deceased to defendant, subject to existing mortgages, the grantor retaining a life estate, and taking back a mortgage for an amount which, with the existing mortgages, made up the whole consideration. Plaintiff also asked to have this conveyance declared null and void as against her right to dower.

A. B. Aylesworth, K.C., and J. W. Bennet, Peterborough, for appellants.

G. H. Watson, K.C., and E. B. Edwards, K.C., for defendant.

OSLER, J.A.— . . . When the plaintiff married her now deceased husband, she being then about 16 and he about 57 years of age, he was possessed of the equity of redemption in certain lands subject to two mortgages which he had created thereon. After the marriage he paid off these mortgages, and made a further mortgage of the same lands, in which the plaintiff joined for the purpose of barring her dower. Some time afterwards the parties disagreed, and the wife left her husband, and with the exception of a very short interval they never lived together again. About three years before his death, the husband conveyed his equity of redemption in these lands, to the defendant, a son by a former marriage, for the expressed consideration of \$10,000, which was not in fact paid. There seems little reason to doubt that this conveyance was really made in order, if possible, to prevent the plaintiff from ever becoming entitled to dower in the land. It may be taken, so far as the relief sought in this action is concerned, to have been a mere gift to the defendant.

The question is, whether the plaintiff is entitled to say that, notwithstanding this conveyance, her husband died beneficially entitled to an equitable estate in respect of which she

may be dowerable out of the land, under the provisions of R. S. O. ch. 164, sec. 2.

The case was argued, as it seemed to me, very much upon the assumption that by analogy to the wife's inchoate right to dower in land in which the legal estate is in the husband, there was a similar inchoate right in respect of dower out of an equitable estate. There is, of course, no such analogy. In the one case there is the common law right arising out of the marriage relation, of which the wife cannot be deprived by the act of the husband in alienating the land during their joint lifetime; in the other the wife has a mere chance or possibility of being dowerable, depending under the statute upon whether the husband does or does not die beneficially entitled to the land for such an estate or interest as is mentioned therein.

Bateman v. Bateman, 2 Vern. 436, distinguished. . . .

In this case the wife had no interest, no estate, inchoate or otherwise, unless the husband had died beneficially entitled to an inheritable estate in possession. While he lived, the estate or interest he had in the land was his own, unaffected by any interest or estate of the wife. He was at liberty to sell or give it away as he pleased, even for the express purpose of defeating the wife's chance or possibility of becoming dowerable in respect of it. She might, no doubt, have proved, if she could, that notwithstanding the deed there was a secret trust in favour of the grantor, so that he still remained beneficially entitled. But the evidence seems to me reasonably clear that, beyond right to maintenance provided for the father, the deed to his son, the defendant, was intended to be absolute and free from any other trust or reservation in his favour.

The appeal must, therefore, be dismissed.

GARROW, J.A., gave reasons in writing for the same conclusion.

Moss, C.J.O., concurred.

JANUARY 26TH, 1903.

C.A.

RAYFIELD v. TOWNSHIP OF AMARANTH.

Municipal Corporations—Drainage—Non-repair of Drains—Injury to Property of Private Person—Damages—Lack of Repair not Cause of Injury—Findings of Drainage Referee—Affirmance on Evidence—Necessity for Notice of Non-repair where Damages Claimed.

Appeal by plaintiff from judgment of the Drainage Referee, to whom the action was referred by BOYD, C., dismiss-

ing it with costs. The action was brought for damages for injury to the plaintiff's land through being flooded with water, consequent, as he alleged, on the respondent's failure to repair certain drains, as it was their duty to do. The Referee found that the plaintiff had not shewn that defendants had failed to repair, and further, that plaintiff, by burning away the brush and vegetable mould on his land to a depth of 18 inches, and thus destroying the sides of the drain, had himself to blame for his damage.

The Referee held that the by-laws of the defendants directing that landowners should not permit obstructions to collect, and should clear them away when they did so, had not been observed, and that their provisions had been familiar to the plaintiff.

M. Wilson, K.C., and J. N. Fish, Orangeville. for appellant.

J. P. Mabee, K.C., and A. A. Hughson, Orangeville. for defendants.

GARROW, J.A.—The main issue between the parties was one of fact. The plaintiff claimed that his lands, crops, etc., were injured because defendants neglected their statutory duty to maintain the drain. The burden upon the plaintiff . . . was to prove that the drain was out of repair, that the defendants neglected their statutory duty to remedy such lack of repair in time to have prevented the injury, and that the lack of repair was the cause of the injury. . . . The defendants allege that the lack of repair was not the cause of the injury, if any . . . I am quite satisfied that the Referee's judgment is correct and based upon the very decided preponderance of the evidence appearing in the case. . . . Upon the facts it appears to me clearly that the plaintiff has failed to prove that his damages, whatever they were, can be in any way attributed to the alleged neglect by defendants of their statutory duty to maintain the drain in question. . . .

I have serious doubts as to whether, in any circumstances, the defendants could have been held liable, it appearing that they had no notice or knowledge of the alleged defects or lack of repairs till about the beginning of July in the year 1899, after all the injury complained of had been done. Failure to repair in a mere private matter, such as these drains are, in which the municipal corporation only acts as part of the machinery to accomplish wholly private ends, should not be put, one would think, on a higher or more imperative footing than a failure to repair a public highway, in which the whole public is interested; and in the case of the

latter it is well recognized law in this Province that before the defendants can be held liable there must be either notice of the defect or circumstances shewing negligent ignorance of it. . . . Then, in the case of a highway, not only must there be notice or the equivalent of notice, but a reasonable time to make the necessary repairs must have elapsed before the negligence which gives a good cause of action is complete. . . .

Then, looking at the sections of the statutes, sec. 606 of the Municipal Act, R. S. O. 1897 ch. 223, provides for the repair of highways by the municipal corporation, and secs. 68 and 73 of the Municipal Drainage Act, R. S. O. 1897 ch. 226, for the maintenance of drains such as the one in question. Liability for damages under the first named statute is certainly not less clearly, peremptorily, and unqualifiedly stated than under sec. 73 of the Drainage Act, and yet, as we have seen, notice to the defendants is necessary under the former to perfect the liability. The latter section (73) makes provision, it is true, for the remedy by mandamus, as well as for the liability in damages for a neglect clearly, and in the case of the latter probably, requiring not merely that there shall be notice, but that the notice shall be in writing. My own impression is, that the proper construction of this section, as it now stands, is that notice in writing is necessary where the claim is for damages, as well as where it is for a mandamus. But, whether that is so or not, I think that there is no legal liability on the part of a municipal corporation for damages for neglecting this duty until notice of some kind of the alleged defect is given to the corporation or to its proper officer, and a reasonable time allowed to remedy the defect. In the present case the evidence shews that immediately after plaintiff notified defendants of the facts, defendants proceeded at once to make the necessary repairs. It is not contended that defendants acted negligently after notice. . . .

Raleigh v. Williams, [1893] A. C. 540, considered and distinguished.

The appeal, however, fails upon the merits and should be dismissed with costs, quite apart from the important question of the want of notice.

Moss, C.J.O.—I think the learned referee reached the proper conclusion, and that the appeal should be dismissed. On the question of what, if any, notice a municipality should receive of want of repair of a drain constructed under or subject to the provisions of the Drainage Act, I express no opinion.

Much may be said in favour of the convenience of requiring notice to be given in writing, but there are cases such as that of a person who is not aware of the condition of want of repair before it has inflicted damage upon him, which have to be considered, and I prefer to withhold for the present any expression of opinion on the subject.

MACLENNAN and MACLAREN, JJ.A., concurred.

JANUARY 26TH, 1903.

C.A.

* CLARK v. WALSH.

Specific Performance—Contract for Sale of Mining Land—Formation of Company—Construction of Contract—Rectification—Delivery of Fully Paid-up Shares—Shares Left in Treasury for Development Purposes—Breach of Contract—Time—Forfeiture—Waiver—Counterclaim—Work and Labour—Assignment of Chose in Action—Notice—Contract—Part Performance—Abandonment.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 228) dismissing the action, which was brought for specific performance of an agreement with respect to certain mining lands, and allowing defendant's counterclaim for \$975, with costs of action and counterclaim to defendant.

A. B. Aylesworth, K.C., and N. W. Rowell, K.C., for appellants.

R. C. Clute, K.C., for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

MOSS, C.J.O.—The appellants (plaintiffs in the action) seek specific performance of an agreement made between the defendant of the one part, and the plaintiff Clark of the other part, for the sale to the latter of certain mining locations in the Rainy River district. By the original statement of claim, the plaintiffs alleged that the agreement was contained in a writing signed by the parties and dated 16th November, 1899. But at the trial before Falconbridge, C.J., questions were raised as to the proper construction of the writing, particularly with reference to the extent to which it was agreed, or intended to be provided therein, that the shares of the company mentioned in the writing should be fully paid-up and non-assessable shares. For the plaintiffs it was argued that upon the proper reading of the written agreement, only the 100,000 shares agreed to be delivered to the defendant were required to be fully paid-up and non-assessable; whereas the

defendant contended that the true reading was that the whole of the capital stock was to be fully paid-up and non-assessable at the time of the delivery of the 100,000 shares for the use of the defendant. The plaintiffs applied to be allowed to amend the statement of claim by alleging that the true agreement was that only the 100,000 shares to be delivered to the plaintiffs were to be fully paid-up and non-assessable. After some discussion the plaintiffs were given leave to prepare and file the proposed amendments, the evidence being proceeded with in the meantime. Leave was also given to include in the proposed amendments a claim, that at the time of making the agreement it was understood and agreed that the company to be incorporated should be an American company, and that it was to be left wholly with the plaintiff Clark to determine whether any of the shares of the company should be left in the treasury for development purposes. The amendment subsequently filed set forth these matters in detail; and also made some further allegations, not necessary to be detailed. After hearing the evidence and argument, the learned Chief Justice refused to allow the amendments, and dismissed the action. It was suggested that the plaintiffs could not in the same action obtain rectification of a written document, and specific performance of the contract as rectified. But there is now no objection to such proceeding: *Olley v. Fisher*, 34 Ch. D. 367; *Carron v. Erie County Natural Gas Co.*, 29 S. C. R. 591, 594.

I am of opinion that according to the true agreement between the parties only the 100,000 shares to be delivered to the defendant were to be fully paid-up and non-assessable. I should be in favour of this conclusion upon the language of the signed document, awkwardly expressed though it be, but the evidence upon which it is sought to rectify it leaves no doubt on the point. . . . And I think that a case for rectification to that extent was made out. But I do not think the plaintiffs have established that it was agreed that it was to be left with the plaintiff Clark to determine whether any shares were to be left in the treasury for development purposes; that is to say, that the defendant agreed that, for a transfer to the company (intended to be formed) of the locations the defendant was to assign to the plaintiff Clark, he was to be at liberty to receive from the company all the shares except the 100,000 to be delivered to the defendant without any further payment to the company for such shares, thus leaving the company possessed of the locations but without one dollar of capital in the treasury for development or any other purpose. There is nothing in the preliminary memorandum or the signed agreement from which an agreement to that effect can be gathered. And it lies upon the plaintiffs to

make out, by what has been termed irrefragable evidence, that neither of the parties intended the agreement to be such as the writing expresses it to be: *Campbell v. Edwards*, 24 Gr. 152, 171.

It was argued that the testimony of the plaintiff Clark, and of Morris, proves an agreement to the effect contended for, and that Walsh admitted the same thing. But what Clark and Morris say is far from sufficient to form the basis for insertion into the writing of an additional term. . . .

In this state of the evidence it would be impossible to rectify the writing by introducing into it a term binding the defendant to an agreement that the company should hand over the whole of its shares as paid-up and non-assessable, for no other consideration than the transfer to it of the mining locations. In the absence of an agreement to that effect, the defendant was entitled to expect that the shares to be delivered to her would be shares in a company which would have a large number of shares to dispose of, and that when they had become fully paid-up, the money or other consideration received for them would form a fund for the development of the property, and the enhancement of the value of the defendant's shares. Whereas, as it appears on the plaintiffs' own shewing, before the defendant's shares were deposited for her, the company had assumed to allot to the plaintiff Clark all the shares of the capital stock as fully paid-up and non-assessable, for no consideration except an assignment of Clark's right to a conveyance of the mining locations. So that the plaintiffs are calling upon the defendant to accept shares in a company which has no capital stock in the treasury, and no assets except the mining locations. Substantially this is a sale by the defendant of the locations for \$2,000, for, as respects the value of her shares, she is altogether dependent upon the goodwill of the plaintiff Clark, and the desire and ability of certain persons whom he has associated with him and to whom he has sold or transferred portions of his stock, to expend money upon the locations. The plaintiff Clark claims that any such expenditures would be loans or advances to the company, and would form a charge upon the assets. If so, the defendant would be obliged to contribute towards their payment, and so, in reality, she would not be getting fully paid-up and non-assessable shares, having the value she was entitled to expect them to have. On this ground alone I think the plaintiffs have failed to shew that they have performed the plaintiff Clark's part of the agreement, and they are, therefore, not entitled to the relief they claim. But the defendant's conduct, through her husband and agent, in the dealings and correspondence

with the plaintiff Clark after the certificates of the transfer of shares were deposited, and in treating him as still entitled to deal with the locations under the agreement, notwithstanding the expiry of the date fixed for the deposit of proper shares, constitutes a waiver of time as the essence of the contract, and disentitles the defendants to insist upon the forfeiture of the \$2,000.

I also think that judgment should have been in favour of the plaintiffs upon the counterclaim. It was contended that the assignment of the claim to the defendant was not sufficient in form to entitle her to maintain an action thereon in her own name; and that no proper notice thereof was given to Walsh prior to the counterclaim. But I think both these objections fail. The assignment is to the defendant absolutely, and there is nothing on its face to shew that it was intended to operate otherwise. As to notice, the assignment bears date 30th April, 1901, but was executed some time in May. The action was commenced on the 5th June, 1901, the statement of claim was filed on the 6th July, and the counterclaim was filed on the 9th July, 1901. On the 6th July, 1901, a notice of the assignment was mailed at Port Arthur, addressed to the plaintiff Clark at Boston, where he resides, and from which he directs his correspondence. The notice reached Boston on the 9th July, but Clark was not there, and it was forwarded to Owen Sound, and was not received by him until after he had testified at the trial. I think this was a sufficient giving of notice under the Act.

But the defendant is seeking payment in respect of an entire contract, which has only been partly performed. She sets up that the plaintiff Clark, by stopping payment of a cheque which he had given in payment of a percentage of the work done in pursuance of the contract, discharged Walsh from obligation to proceed further with the work. But the stoppage of payment was the result of the attitude taken by Walsh that he did not recognize Clark as longer entitled to any interest in the property, and that he would not continue to work for him under the contract, unless Clark agreed to his proposals. Clark offered to pay the cheque, and to continue paying if Walsh would go on with the work, but Walsh refused. He says that he commenced work about the 2nd February, and continued until the 23rd April, when he had gone down about 39 of the 50 feet to be sunk, under the contract. On the 17th March, when he had sunk about 20 feet, he quitted working for Clark, and after that was working for himself; but the claim is for payment for the 39 feet. It appears, therefore, that he deliberately decided to abandon the contract, and to work for himself or for his wife, and he

refused Clark's offer to pay if he would proceed with the work for him.

In no case could there be a recovery for more than 20 feet, but I think that there can be no recovery.

The appeal as to the counterclaim should, therefore, be allowed.

As to costs, the defendant is entitled to the costs of the action; the plaintiffs to the costs of the counterclaim, and to such costs of the appeal as relate thereto; the defendant is entitled to the other costs of the appeal; the costs to be set off.

The defendant is to pay to the plaintiffs the remainder of the \$2,000. after deducting therefrom any balance of costs to which she may be entitled, and there is to be a lien on the locations for the amount payable by her to the plaintiffs.

JANUARY 26TH, 1903.

C.A.

BLAIN v. CANADIAN PACIFIC R. W. CO.

Railway—Carriers of Passengers—Duty to Protect from Assault—Negligence—Evidence of Justification for Assault—Mitigation of Damages—Excessive Damages.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiff for \$3,500 upon the findings of the jury in an action (tried at Toronto), brought by Thomas Joseph Blain, a barrister, of Brampton, to recover damages for injuries sustained by him upon a train of defendants on the 10th October, 1901. The plaintiff, as he stated, shortly after entering a car in a train going from Toronto to Brampton, was assaulted by one Anthony, a passenger upon the train, who threatened then and there to renew the assault. Immediately after this assault, and prior to the train leaving the station, the plaintiff informed the conductor of the train of the assault and of the threats that it would be renewed, and requested the conductor to remove Anthony, but the conductor did not do so, and the plaintiff was again twice assaulted and beaten by Anthony. The plaintiff alleged a duty on the part of the defendants to the plaintiff as a passenger to carry him peaceably and free from violence, and the breach of such duty. The jury found the defendants guilty of negligence and assessed the damages at \$3,500, for which amount and costs judgment was entered.

E. F. B. Johnston, K.C., and Shirley Denison, for the appellants.

W. R. Riddell, K.C., D. O. Cameron, and J. G. O'Donoghue, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, JJ.A.) was delivered by

MOSS, C.J.O. (after stating the facts and evidence at length):—The duty or obligation which defendants owed plaintiff was to carry him to his destination, and to use reasonable care and diligence in providing for his comfort and safety while being conveyed by them. How far they used such reasonable care and diligence depends upon the circumstances which arose, and the extent of their notice or knowledge of them in time to prevent them, or protect plaintiff from their consequence.

In *East Indian R. W. Co. v. Kalidas Innkerjée*, [1901] A. C. 396, the Judicial Committee rejected the argument that it may be regarded as settled law that in the case of carriers of passengers under statutory powers there exists an express duty, independently of any implied contract, to carry them safely. . . .

Cases have been referred to, English as well as American, in which the broader rule has been acted upon, but for the purposes of this case it may be taken that the law is, that in order to succeed plaintiff must prove negligence. It follows, of course, that proof of notice or knowledge, or reasonable opportunity of knowing of the acts complained of, is essential to establish the negligence.

I find it impossible to say that there is not evidence upon which the jury might reasonably find defendants guilty of negligence.

If the conductor had been present when the assaults were committed and took no steps to protect plaintiff or to prevent their recurrence, it could scarcely have been argued that defendants would not be liable. [*Pounder v. North Eastern R. W. Co.*, [1892] 1 Q. B. 385, *Cobb v. Great Western R. W. Co.*, [1893] 1 Q. B. 459, [1894] A. C. 419, and *Beven on Negligence*, 2nd ed., pp. 1209, 1212, 1213, referred to.]

There is ample evidence that plaintiff was assaulted and ill-used in the train, and that the conductor was told of Anthony's conduct and threats to continue it. It was for the jury to judge whether, with the knowledge he had, he acted reasonably and diligently, or whether, after being told, as he was, by plaintiff and others, of Anthony's condition and the assaults he had committed on plaintiff and other passengers before the train left the Union Station, and after being again warned at Parkdale, the conductor acted unreasonably and negligently in refusing and failing to take reasonable steps to prevent the after assaults. . . .

The evidence tendered as to the supposed relations between plaintiff and Anthony's wife was, I think, properly

rejected. Even assuming what was sought to be proved to have been shewn, it could not justify defendants' failure to adopt proper means for preventing Anthony from misconducting himself on the train. . . . Nor was it proper to submit to the jury on the question of damages. Plaintiff was not seeking damages for injury to his personal character and reputation.

It was strongly contended that the amount of damages was excessive. Plaintiff conceded, and the Chief Justice directed the jury, that defendants were not responsible for the first assault at the Union Station. But for the defendants it was urged that in any case they were not liable for the second assault, in which the most serious injuries were inflicted. If the jury were of opinion, as they must have been, that the conductor, after the notice and knowledge he had from what he was told at the Union Station and Parkdale, did not act reasonably and diligently, but, on the contrary, was negligent in taking proper steps to secure plaintiff against further molestation, it cannot be said that they erred in awarding a fairly large sum, in view of the evidence as to the nature of the injuries inflicted and their permanent effect.

The learned Chief Justice fully directed the jury on the question, drawing their attention to all the points that were urged in mitigation of damages, and under the circumstances the amount does not appear so large as to warrant interference on that ground.

The appeal should be dismissed.

JANUARY 26TH, 1903.

C.A.

DILLON v. MUTUAL RESERVE FUND LIFE ASSN.

Life Insurance—Misstatement of Insured as to Age and Disease—Rejection of Evidence as to Actual Belief and Good Faith—New Trial—Questions for Jury—Materiality of Misstatements.

Appeal by defendants from judgment of BRITTON, J., in favour of plaintiff upon the findings of the jury, in an action upon a policy of insurance for \$2,000 on the life of John Dillon.

E. D. Armour, K.C., and R. B. Henderson, for appellants.

I. B. Lucas, Owen Sound, and W. H. Wright, Owen Sound, for plaintiff.

The judgment of the Court (MOSS, C.J.O., GARROW, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—The main defences to this action were that in his application made on the 27th January, 1891, the in-

sured John Dillon untruly stated that he was born on the 24th August, 1850, and was then 41 years of age, the fact being that he was nearly 44, and further, that in the same application he untruly stated that he had not at the date of the application and never had the disease of abscess or of open sore, the contrary being the fact.

At the trial the defendants proved beyond reasonable doubt that the insured was, in fact, nearly 44 years of age at the date of the application. instead of 41, as therein stated.

Counsel for the plaintiff was proceeding to elicit evidence from James Clark, a witness called for the defendants, as to statements made by the insured many years before the application, tending to shew his belief that he was born in 1850, but objection was taken by counsel for the defendants, and the learned trial Judge having indicated his view as in favour of the objection, the witness was not allowed to answer fully.

We think that the evidence sought to be elicited was admissible for the purpose of shewing that the statement regarding his age made by the insured in the application was made in good faith and without intention to deceive, and that the witness ought to have been allowed to answer fully. There seems to us to be no valid objection to the admissibility of such evidence on the question of good faith, and the jury should have been allowed to hear all that the witness could say: *Fellowes v. Williamson*, *Moody & Mal.* 306; *Vaehy v. Cocks*, *Moody & Mal.* 353; *Cerri v. Ancient Order of Foresters*, 28 O. R. 111, 25 A. R. 22-23; *Hargrove v. Royal Templars*, 2 O. L. R. 126. . . .

Upon the appeal the defendants contended that the jury having by their answers to the 2nd and 8th questions found that the statement made by the insured as to his age was material, and there being no evidence to support the finding of good faith and want of intention to deceive, judgment should have been entered for the defendants. Plaintiff's counsel took the position that under the pleadings, and in view of sec. 149 of the Insurance Act, the onus was on the defendants to shew want of good faith and an intention to deceive. But we do not think the language of the section warrants this contention. We think that where the statement as to the age is found to be material and untrue, an avoidance of the contract follows, unless that result is prevented by its being made to appear that the statement was made in good faith and without intention to deceive. And it must lie upon the person seeking to uphold the contract to make proof of it.

The jury found that the statement was material and untrue, and on those findings the defendants were entitled to judgment in their favour if the jury could not properly find

that the statement was made in good faith and without intention to deceive.

But the plaintiff was interfered with and prevented from eliciting evidence on the point. And we think there should be a new trial to afford the plaintiff an opportunity of adducing evidence on that point.

As there is to be a new trial, we do not enter upon a discussion of the other branch of the case further than to say that we think it would have been more satisfactory if, in addition to or in lieu of some of the questions put to the jury, other questions framed in such manner as to obtain direct findings on the point of whether or not the statements made by the insured that neither at the date of the application nor previously thereto had he the disease of abscess or open sore were untrue, and if so, whether such statements were material, had been submitted to the jury. The question in the application is not whether the insured ever had an abscess or an open sore, but 'Have you now (i.e., at the date of the application) or have you ever had any of the following diseases or complaints?' And amongst others enumerated are "abscess" and "open sore."

And the opinion of the jury might very properly be taken upon the point of whether the existence of an abscess or open sore in earlier years was something material to be stated by the insured in answer to the interrogatories: *Moore v. Connecticut Ins. Co.*, 41 U. C. R. 497, 3 A. R. 230, 6 App. Cas. 644.

We may say further, that we think the question of materiality was properly left to the jury.

There will be a new trial; the costs of the former trial and of the appeal to be costs in the action.

JANUARY 26TH, 1903.

C.A.

HOLDEN v. GRAND TRUNK R. W. CO.

Master and Servant—Injury to Servant—Death—Action by Widow under Fatal Accidents Act—Workmen's Compensation Act—Railway—Engine-driver—Disobedience of Rules—Nonsuit.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., at the trial at Hamilton, dismissing the action, which was brought by the widow of Walter Holden to recover damages for his death. He was an engine-driver of a passenger train of defendants, which was alleged to have been derailed at the smelting works crossing near the city of Hamilton, owing to the negligence of defendants' servant in charge of the points and signals there, whereby Walter Holden was

killed. The trial Judge held that there was no case of negligence for the jury on the undisputed facts, and that, by reason of deceased having been a member of an insurance and provident society to the funds of which defendants contributed, and being bound by defendants' rules and contracts, he could not have maintained an action for his injuries had he survived, and no more could plaintiff for his death.

G. Lynch-Staunton, K.C., for plaintiff.

W. Cassels, K.C., and W. Nesbitt, K.C., for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

OSLER, J.A. (after stating the facts and evidence at length):—The plaintiff's case is that the proximate cause of the accident was the negligence of the defendants in not having the switch points spiked over or otherwise properly secured. The defendants, while not denying that they were not in fact secured as they ought to have been, contend that the accident is to be attributed to the unfortunate engine-driver's own breach of duty in neglecting rules of the company which he was bound to observe, and running his train on to the crossing when the signals were in such condition as to be a warning to him not to proceed with his train until he was signalled that the line was safe.

There would, in my opinion, be no difficulty in holding that, if the signals displayed had been such as to have warranted the deceased in running through the crossing, or if the signal man had flagged him to proceed, there was ample evidence of negligence in the condition of the switch to have justified a verdict for the plaintiff under sub-sec. 1 of sec. 3 of the Workman's Compensation Act. There was a plain defect in the condition of the way which was the immediate cause of the derailment of the engine.

In actions of this nature, however, under the Fatal Accidents Act, the plaintiff, as administratrix of the deceased, can only recover if the deceased could himself, had he lived, have maintained an action against the defendants for the alleged negligence: *Senior v. Ward*, 1 E. & E. 385. And if the injury happened in consequence of the deceased's own neglect of orders or other breach of duty, it is clear that, had it been one falling short of causing his death, he could not have sued, being himself the author of the wrong he complained of.

It appears to me that this is one of the plaintiff's difficulties in the present case.

The rules under which the deceased was working, and to which he was bound to conform, at the time of the acci-

dent, were those which came into force and were relative to the order he had received on the 27th October in respect of the new signal system. He had no right to pass the signals unless the main line was clear. Necessarily he had to observe or take notice of both these signals. If both arms of the semaphore were down, they conveyed no intimation to him except that the signals were inconsistent, and therefore that from some cause or other the interlocker was out of order or not working properly. He could not regard the main line signal as a safety signal, because the siding signal as displayed was inconsistent with it, and the evidence is all one way that these signals as they stood were inconsistent and imperfectly displayed. Rules 59, 60, 187, and 233, and the rule cited from his time table, map out the clear and simple course he should have taken in such circumstances. It has not been contended that in the absence of signals of some kind shewing safety for the main line he was right in proceeding to the switch. Except these imperfect signals he received none, as the signal man displayed none, and did not flag him through, which, in the alternative, he should have looked for before he went through. It was urged by Mr. Lynch-Staunton that deceased was justified in inferring safety from the fact that the signal for the main line was down, and that the man standing near whom he might have seen was a signal man who did not warn him of danger or give a signal of any kind, but if the rule requires, as it does, that he should be signalled or flagged through the switch, if the semaphore signals are imperfectly displayed, I do not see how the omission to signal at all relieves him of the imputation of neglect of orders in proceeding without being signalled.

It is said that the fact of the signal or tower man not having taken charge of the interlocker, because of the switch company having for some unexplained reason continued to work at it, makes a difference, but I do not think so. The deceased did not know that. The orders under which he was working required him to act as if the new system was in operation, and had he done so the accident would probably not have happened. To him the only information conveyed by the facts was that the interlocker was not in order, and the proper course to be adopted in that case was defined for him by the rules.

I am therefore of opinion that, for the reasons I have stated, the action was properly dismissed, and that being so, it becomes unnecessary to consider the other ground of defence arising out of the plaintiff's acceptance of the insurance money paid to her by the Grand Trunk Railway Insurance and Provident Society.

JANUARY 26TH, 1903.

C.A.

MOYER v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Negligence of Railway Company—Train Running Backwards—Rate of Speed in City—Statutes—Warning—Contributory Negligence—Findings of Jury.

Appeal by defendants from judgment of MACMAHON, J., upon the findings of the jury, awarding plaintiff, the widow of Ryerson Moyer, deceased, \$1,200 damages for the death of her husband, who was run over by an engine and tender of defendants while passing over the Jarvis street crossing of the Esplanade, in the city of Toronto, on 21st January, 1901. The jury found (one juror dissenting) that the death was caused by defendants' negligence in omitting to sound the whistle and apply the brakes, and in not having proper protection when running backwards; that the engine and tender were running at the rate of six miles an hour, contrary to statute; that the deceased was guilty of contributory negligence, but that defendants could have avoided the accident by the exercise of reasonable care. The appeal was on the grounds, inter alia, that plaintiff should have been nonsuited, and that neglecting to sound the whistle does not give a cause of action.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, J.J.A.

Wallace Nesbitt, K.C., and H. E. Rose, for appellants.

I. F. Hellmuth, K.C., and D. W. Saunders, for plaintiff.

GARROW, J.A.—I do not see how the case could have been withdrawn from the jury. It is quite true that, had deceased looked easterly, he could have seen the engine approaching, in time to have avoided it, and it is also true that the evidence strongly suggests, although it does not absolutely establish, that he did not look, or, if he looked, that he did so too late to avoid the injury. But not looking is not per se negligence, though it may be strong evidence of it, and the matter was therefore one for the jury to consider in the light of all the surrounding circumstances. Deceased was an elderly man, and although in possession of sight and hearing, his apprehension was, doubtless, not quite so acute as in a younger person. His attention was directed to the passing train on the Canadian Pacific track, which had interrupted his course, and but for which he would have passed on easily out of all danger. The ringing of a bell more or less might well be overlooked by the most cautious at such a place, where there are doubtless much bell-ringing and other

noises incidental to a much used railway crossing; indeed at this very time the bell on the Canadian Pacific train was ringing. Even if he had looked . . . he might well in a merely casual or momentary glance have been deceived as to the track on which the engine was approaching, or even as to whether it was really approaching or not, in view of the fact that it was in the unusual position of backing up, with the tender instead of the engine in front. These were all, I think, proper subjects for the consideration of the jury in weighing the question whether the deceased was himself the author of his injury or guilty of contributory negligence, in case they found that defendants had been negligent, of which latter proposition there certainly was some evidence in the fact that they were running an engine in an unusual manner, at an unlawful speed, over a much used and highly dangerous crossing.

It is proper to notice that defendants contend that the speed was not unlawful; that the provisions of 28 Vict. ch. 34, sec. 7, have been superseded by the general Railway Act, 51 Vict. ch. 29, sec. 259, and 55 & 56 Vict. ch. 27, sec. 8, which allow a speed of six miles; but these latter provisions cannot, I think, be held to have repealed the special provision contained in the earlier Act, as applied to the Esplanade, especially as, at the time the latter Act was passed, the provision as to speed in the general Act was practically as at present: see C. S. C. (1859) ch. 66, sec. 144.

Nor can it be said that it is sufficient in every case to prove compliance with the statutory provisions as to the ringing of a bell or the blowing of a whistle as a warning. The special circumstances may call for something in addition: *Lake Erie and Detroit River R. W. Co. v. Barclay*, 30 S. C. R. 360: and what that something is, is, on the evidence in each case, a question of fact for the jury. The jury has, in effect, found, and I think the finding is amply warranted, that it was negligence to propel this engine backwards without "proper protection," which would include a look-out upon the tender. Had such a look-out been established, it is reasonably certain that the injury complained of would not have happened. They have also found that the whistle should have been blown and the brakes applied. I cannot say that they were not justified upon the evidence in making this finding also. Indeed, had they found that the fireman should have called to deceased to warn him when so near him, the finding would have had some justification, for deceased was easily within reach of the fireman's voice when only between 30 and 40 feet away.

I think the appeal fails and should be dismissed with costs.

OSLER, J.A.—I agree in dismissing the appeal, and with the reasons assigned therefor in the judgment of my brother Garrow. I do not think the case can be distinguished favourably for the defendants from our recent decision (10th April, 1902) in *Bonnville v. Grand Trunk R. W. Co.*, 1 O. W. R. 304.

MOSS, C.J.O., and MACLENNAN, J.A., concurred.

JANUARY 29TH, 1903.

C. A.

FARRELL v. GRAND TRUNK R. W. CO.

Way—Bridge—Injury to Infant Playing thereon—Notice to Public that Bridge not to be Used—Action for Death of Infant—Nonsuit.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., at Hamilton, upon the findings of the jury, in favour of plaintiff for \$800 in an action for damages under Lord Campbell's Act by the father of the boy who was killed by falling from the McNab street bridge in the City of Hamilton, for repair of which the defendants were responsible, and which was under repair on the 4th July, 1901, when the boy fell. The bridge was barricaded; and there was a notice posted that it was "no thoroughfare," but the boy, with two others, clambered over the barriers, and got upon the bridge. The boy went to the edge of the bridge and got upon a loose plank, which tipped up, and he fell forty or fifty feet upon the railway track, and was instantly killed. The jury found that there was no negligence on the part of the boy, and that there was negligence on the part of the company in not having a watchman at the approach to the bridge, and assessed the plaintiff's damages at \$800. The event occurred early in the evening, after the workmen had stopped work for the day, and while it was still light.

A. B. Aylesworth, K.C., for the defendants, contended that there should have been a nonsuit, or at all events that the verdict was perverse.

D'Arcy Tate, Hamilton, for plaintiff, contra.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) held that there was sufficient notice to the public that the bridge was not to be used, and that the presence of a watchman was not necessary, and therefore defendants were not liable. In the course of the argument *Ricketts v. Village of Markdale*, 31 O. R. 610, was cited, and doubted by some of the members of the Court.

WINCHESTER, MASTER.

JANUARY 26TH, 1903.

CHAMBERS.

BEDELL v. RYCKMAN.

*Discovery—Examination of Party—Affidavit of Documents—
Action by Shareholder against Directors of Company for
Discovery and Account—Fraud—Parties—Company—
Plaintiff or Defendant—Statement as to Plaintiff Suing
on Behalf of all Shareholders—Waiver—Amendment.*

Motion by plaintiff for an order directing defendant George A. Cox to file a further and better affidavit on production and to attend at his own expense and submit to be examined and answer certain questions which he refused to answer upon the advice of counsel upon his former examination for discovery in this action. The plaintiff, as a shareholder of the Canada Cycle and Motor Company, sued certain directors of the company to obtain (1) full discovery of the true price at which certain businesses were acquired and of the sums obtained from the company in connection with certain contracts mentioned in the statement of claim and of the sums paid in connection with the same, and generally of their dealings with the company and the five companies in connection with these contracts; (2) judgment for \$342,500 or other greater sum to be paid defendant company; (3) the return to the company of 30,000 shares of common stock, or, in the alternative, for a declaration that defendants the directors hold the shares for the company, and an account of shares sold or disposed of; (4) a declaration that such sum and such shares were received by defendants unknown to plaintiff and to the shareholders of the company, and to the company; (5) for the repayment of such further or other profits as defendants may upon the trial of this action be shewn to have made. The questions which defendant Cox refused to answer related to the amounts paid to the five companies whose businesses were transferred, and to the underwriting of this company by this defendant, and to his shares. The objection to answering was upon the ground that plaintiff must first shew that he is entitled to the account sought before he can obtain discovery in respect thereof. Upon this motion it was objected by defendants that the company should be a party plaintiff, and that plaintiff was not suing on behalf of himself and all other shareholders of defendant company other than the defendants the directors.

W. R. Riddell, K.C., for plaintiff.

W. H. Blake, K.C., for defendant Cox.

THE MASTER referred to *Alexander v. Automatic Telephone Co.* [1900] 2 Ch. 56, and said that the facts as set out in the pleadings and proceedings in this action brought the case within the class of cases which permit plaintiff to use the company's name by making it a defendant, and that the company was properly made a defendant.

With reference to the objection that plaintiff was not suing on behalf of himself and all other shareholders, the Master referred to paragraph 7 of the statement of claim, in which the plaintiff stated that he is so suing, though it was not so stated in the writ of summons. Referring to *In re Tottenham*, [1896] 1 Ch. 628, and *McNab v. Macdonnell*, 15 P. R. 14, the Master held that, as no objection was taken to the irregularity of the statement of claim, but defendant filed a defence to it and thus waived the irregularity, leave to amend should be given so as to make the statement in the intituling of the statement of claim.

Upon the main question of discovery, the Master followed *Gluckstein v. Barnes*, [1900] A. C. 240, and other cases, and held plaintiff entitled to the fullest discovery. Fraud is sufficiently charged, the accounts are not intricate or voluminous, the defendant Cox admits that he can give the discovery without difficulty, and the discovery, if given, will enable the Court at the trial to give plaintiff judgment without any reference, if defendants are found liable.

Order made directing defendant Cox to attend for re-examination at his own expense and answer all proper questions that may be asked of him, including those he refused to answer; also directing him to file a further affidavit on production setting forth documents, which he admits he has in his possession, relating to the matters in question, and not already produced. Costs to plaintiff in any event.

FALCONBRIDGE, C.J.

JANUARY 27TH, 1903.

TRIAL.

KROLIK v. ESSEX LAND, LOAN, AND IMPROVEMENT CO.

Vendor and Purchaser—Contract for Sale of Land—Action to Rescind—Fraud—Representations of Agent for Vendors as to Value—Large Commission Paid to Agent—Laches and Acquiescence.

Action for rescission of agreement for sale of land, tried without a jury at Sandwich. The agreement in question was dated and entered into on 6th April, 1892, respecting a block

of 11 2-10 acres of land in the city of Windsor. Plaintiffs endeavoured during eight years thereafter to sell off the property in small lots, with indifferent success, and they held an auction sale on the 17th July, 1900, which was advertised as a sale without reserve, and which proved wholly abortive. A day or two later plaintiffs professed to discover for the first time that a fraud had been practised on them by the alleged concealment of the vendors (the defendant company) of the fact that they were paying to defendant McMath a commission of \$1,000 on the sale of the property, and that there had been fraudulent misrepresentations by McMath of the value of the land, for which defendant company ought to be held responsible. By notice dated 10th August, 1900, plaintiffs assumed to rescind and repudiate the agreement, and demanded repayment of the moneys and interest paid and expended by them under the terms of the agreement. Defendant company did not recognize the attempted rescission, but continued to claim payment of the balance due to them under the agreement, and this action was not brought until 5th June, 1902.

J. L. Murphy, Windsor, and J. E. O'Connor, Windsor, for plaintiffs and some of the defendants.

R. F. Sutherland, K.C., for defendant company.

FALCONBRIDGE. C.J.—It cannot be found on the evidence that the alleged misrepresentation as to value was anything more than a statement of opinion, nor that any statement made by McMath reached the limit of exaggeration. The year 1892 was a "boom time" for Windsor. Prices were, no doubt, beyond actual values for any immediate purpose except to sell again, but still higher prices were looked for. The purchasers could have no ground for neglecting to examine for themselves property so accessible, and to ascertain its real condition. No fraudulent suppression of the fact that McMath was getting a commission from defendant company was brought home to any officer or member of the company. The amount of the commission was large in proportion to the amount of the purchase money, \$11,500, but this was explained by the fact that defendants (who were interested in other adjoining properties) thought they were securing purchasers who would advertise, develop, and "boom" the property. It is a fact that defendant company, being moved by these considerations, refused an offer which would have netted them \$700 more than plaintiffs agreed to pay. If plaintiffs ever had any rights, they have lost them by delay and acquiescence.

Action dismissed with costs. Judgment for defendant company on counterclaim for balance due under the agreement, with costs. Amount of balance to be ascertained by Master if parties cannot agree.

STREET, J.

JANUARY 29TH, 1903.

TRIAL.

PERRY v. CLERGUE.

Constitutional Law—Right of Dominion Government to Grant Lease of Ferry—River Separating Canada from the United States—B. N. A. Act, sec. 109—“Royalties”—B. N. A. Act, sec. 91, sub-sec. 13—Legislative Authority over Ferries—Distinction between Rights of Property and Legislative Power—Public Harbour—Improvements—Rights Arising from.

Action by Robert Davey Perry and the Sault Ste. Marie Ferry Company against F. H. Clergue, W. B. Rosevear, the International Transit Company, and the Algoma Central and Hudson Bay Railway Company, to restrain defendants from infringing upon the exclusive right claimed by plaintiff Perry to a ferry between the town of Sault Ste. Marie in the Province of Ontario and the town of Sault Ste. Marie in the State of Michigan across the St. Mary's river, which passes between these places, and for damages. The plaintiff Perry claimed the right to this ferry and to prevent defendants from ferrying persons across the river from any point in the Canadian town to any point in the American town, under and by virtue of a lease made to him in the name of Her late Majesty by the government of the Dominion of Canada, dated 21st May, 1897, of the ferry right for nine years at the annual rent of \$100, subject to certain conditions, one of which was that “the limits of the ferry shall be co-terminous with the limits of the town of Sault Ste. Marie, Ontario, to a point in the town of Sault Ste. Marie, Michigan, to be fixed by the municipal authorities of that place.” It was admitted that defendants the Algoma Central Railway Company had since the month of August, 1902, been running a steamboat regularly every half hour from their dock in the Canadian town across the river to a point in the American town, and had advertised it as a ferry. These defendants denied plaintiffs' title to the ferry, and claimed the right to run this steamer under one of the provisions of their charter as a railway company.

G. H. Watson, K.C., for plaintiffs.

W. Nesbitt, K.C., and J. E. Irving, Sault Ste. Marie, for defendants.

W. R. Riddell, K.C., for the Attorney-General for Ontario.

The Dominion authorities were not represented, though notified.

STREET, J., held, that plaintiffs had failed to shew that the defendants other than the railway company had done anything to interfere with the rights claimed by plaintiffs. The railway company were alone liable, if any one was, for what had been done. Various defences were set up by the railway company, but it was necessary to consider only that which denied that the Dominion Government ever became possessed of the right to grant a lease to plaintiff Perry of the ferry in question, and asserted that right as existing only in the Provincial authorities. By sec. 109 of the British North America Act, it is provided that "all lands, mines, minerals, and royalties belonging to the several Provinces . . . at the Union . . . shall belong to the several Provinces . . . in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same." The meaning to be attached to the word "royalties" in this section includes not only those *jura regalia* connected with lands, mines, and minerals, but also those which are not so connected, and it includes the right to grant ferries. Reasons suggested by Lord Selborne in *Attorney-General v. Mercer*, 9 App. Cas. 767, 778, specially referred to.

It was argued that under sub-sec. 13 of sec. 91, by which the legislative authority of the Dominion Parliament over "ferries between a Province and any British or foreign country or between two Provinces" is declared to be exclusive, the right of the Dominion Government to grant this ferry could be supported. The difference between the right of property in and the power of legislation over any particular matter dealt with by the British North America Act is conclusively settled, and a right of property in the Province is quite consistent with the right of the Dominion to legislate: *The Fisheries cases*, [1898] A. C. 700; *St. Catharines Milling Co. v. The Queen*, 14 App. Cas. 46; *Ontario Mining Co. v. Seybold*, 87 L. T. 449.

Even if the St. Mary's river at the point in question was a public harbour, the Dominion Government would not therefore have the power to grant the right of ferry over it. Something more is necessary to convert an open river port into a public harbour, within the meaning of the British North America Act, than the erection along it of four or five wharves projecting beyond the shallows of the shore for the convenience of vessels receiving and discharging passengers and goods. Nor does the existence of the improvements

made in the river bed in front of the town by the dredging operations carried on by the Dominion Government for the purpose of deepening the channel leading to and from the ship canal, afford a reason why the entire control over the ferry across the river should be held to be in the Dominion Government. That government has undoubtedly a right to make rules with regard to this and other ferries for the purpose of regulating them and of preventing them from interfering with the public harbours and river and lake improvements of the Dominion, but the right to create and grant the right to a ferry is a right which belongs to the Provincial and not to the Dominion authorities. Action dismissed with costs as against all the defendants.

WINCHESTER, MASTER.

JANUARY 30TH, 1903.

CHAMBERS.

EVOY v. STAR PRINTING AND PUBLISHING CO.

*Security for Costs—Libel—Newspaper—Mistake—Apology—
Good Defence—Grounds of Action Trivial or Frivolous.*

Motion by defendants for security for costs in an action for libel against the publishers of the Daily Star, a newspaper published in the city of Toronto. The writing complained of appeared in defendants' issue of 2nd April, 1902, in a report of proceedings before the police magistrate for the city of Toronto, as follows: "A year ago last August Matthew Evoy was thought to have been a frequenter of a disorderly house, and a warrant was issued for his arrest. But he disappeared as mysteriously as though he had ascended to some other clime, and the warrant could not be executed. He was in Court this morning, and affirmed that he had been in the city all the time and working. 'I think you have earned your discharge,' said his Worship. The inference might be that he was to be complimented for eluding the police so successfully." It appeared from an affidavit filed on behalf of defendants that the plaintiff was not the man who had disappeared and to whom the magistrate had made the remark quoted, but another man; that the defendants had published a correction; and that plaintiff had in fact been before the magistrate on some charge on the day in question, and had been confused with the other man by defendants' reporter. The application was made under R. S. O. ch. 68, sec. 10. It was admitted that plaintiff was not possessed of sufficient property to answer costs, but it was contended that defendants had not a good defence on the merits and that the grounds of action were not trivial or frivolous.

J. B. Holden, for defendants.

G. P. Deacon, for plaintiff.

Cox was in no sense the agent of Walmsley to say or do things improperly to induce the other defendants to sign the notes, if in truth he did say or do any of them. It was immaterial whether Cox or Walmsley first suggested that the wife and daughter should become parties to the note. All the defences failed.

Judgment for plaintiff for amount of the notes with interest and costs.

STREET, J.

JANUARY 26TH, 1903.

CHAMBERS.

RE HUNT.

Will—Daughter of Testatrix Named as Devisee Predeceasing Testatrix—Rights of Husband of Daughter—Tenancy by the Curtesy.

Hannah Hunt by her will directed her estate to be sold, and the proceeds to be divided into four equal shares, one share to be paid to each of her four children, naming them.

Susanna Jewell, a daughter, predeceased the testatrix, intestate, leaving a husband and two infant children.

The executors moved under Rule 938 for an order declaring the rights of the husband and children.

F. S. Mearns, for the executors and John Jewell, the husband.

F. W. Harcourt, for the infant children.

R. S. O. ch. 128, sec. 36, *Eager v. Furnivall*, 17 Ch. D. 115, *Johnson v. Johnson*, 3 Hare 157, and *In re Scott*, [1901] 1 K. B. 228, were referred to.

STREET, J., held that the husband of Susanna Jewell was entitled to a one-third interest in the share given to his wife, the infant children taking the remaining two-thirds.

STREET, J.

FEBRUARY 2ND, 1903.

CHAMBERS.

GREER v. POWELL.

Arrest—Motion to Set aside Order for—Judge in Chambers—Motion to Discharge—Order Obtained while Defendant in Custody on Criminal Charge.

Motion by defendant to set aside an order for his arrest, and the arrest, or to discharge him from custody thereunder.

J. H. Moss, for defendant.

W. H. Blake, K.C., for plaintiff.

STREET, J.—A Judge in Chambers cannot entertain the motion to set aside the order: *Damer v. Busby*, 5 P. R. 356. The defendant absconded from Ontario to the North-West Territories, and was brought back by persons other than plaintiff, upon a charge of embezzlement, upon which he was convicted and allowed to go on suspended sentence, so far as the criminal charge was concerned. While he was so in custody, plaintiff obtained the order for arrest and lodged it with the sheriff. There was nothing objectionable in the practice followed by plaintiff under these circumstances; he was not bound to wait until the prisoner had been discharged from custody under the criminal charge before applying for an order for arrest under civil process: *Ramsden v. Macdonald*, 1 W. Bl. 30; *Coppin v. Gunnell*, 2 Ld. Raym. 1572; *Altroffe v. Lunn*, 9 B. & C. 395; Rule 1021 (3); Form 135. Upon the merits no ground was shewn for discharging defendant from custody. Motion dismissed with costs.

STREET, J.

FEBRUARY 2ND, 1903.

TRIAL.

MURRAY v. SIMPSON.

Trusts and Trustees—Purchase of Land—Principal and Agent—Lien for Purchase Money—Purchase for Value without Notice—Damages for Detention of Land.

Action begun on 22nd November, 1901, by the wife of David Murray, against Nelson Simpson and his wife, B. J. Clergue, the Lake Superior Power Company, and the Algoma Central Railway Company, to whom the Lake Superior Power Company had transferred a part of the land in question, 67 acres in the township of Korah, adjoining the town of Sault Ste. Marie, claiming a reconveyance and damages for registering a cloud upon her title, as well as for the detention of the land.

A. B. Aylesworth, K.C., and C. A. Moss, for plaintiff.

W. R. Riddell, K.C., and P. T. Rowland, Sault Ste. Marie, for defendants.

STREET, J. (after setting out the facts and evidence at length):—The position is this. Simpson knew that plaintiff was in effect the beneficial owner of the land, and that W. H. Plummer held the title for her, subject only to the payment of his lien of \$264; he paid Plummer the amount of the lien, and took the title in his own name, representing to Plummer that it was part of the arrangement upon a sale which he had made to plaintiff. This statement was untrue in fact, al-

though not wilfully so, and Simpson's position upon his agency to sell at \$625 being repudiated, he became a trustee for plaintiff of the title he had so obtained, with a lien for the amount he had paid Plummer. If he had completed the transaction and obtained a conveyance from plaintiff to himself, then, no doubt, he would have ceased to hold the title obtained from Plummer as trustee for her, and would thenceforth have held it as trustee for Clergue; but until the contract was carried out Simpson was, as Clergue knew, acting as agent for Mrs. Murray, and he could not deprive him of that character before the contract was completed, by asking him to take the conveyance of the property in his own name as trustee for him, Clergue; it was only at the completion of the contract, and not while it remained incomplete, that Clergue intended Simpson to become trustee for him of the title acquired under the contract, and, as the contract never was completed, Simpson remained trustee for plaintiff, and never became trustee for Clergue or the other defendants. The defence set up of purchase by Clergue for value without notice cannot be sustained because it is clear that he had actual notice that plaintiff, and not Plummer, was the true owner. The other defendants are not entitled to any better position than that of Clergue.

Judgment declaring that defendants other than Simpson hold the three-fourths interest in the 67 acres in trust for plaintiff, subject to the payment by plaintiff to them of \$264, with interest from 1st November, 1899, and that upon payment of that sum they are to reconvey to plaintiff free from any incumbrances created by them or any of them. There will be no damages to plaintiff; she will have back the land, which has largely increased in value since the sale. Defendants to pay plaintiff's costs.

FALCONBRIDGE, C.J.

FEBRUARY 2ND, 1903.

TRIAL.

MCGREGOR v. MCGREGOR.

Partnership—Winding-up—Application of Proceeds of Sale of Partnership Lands—Claim upon Judgment of Foreign Court—Jurisdiction—Amendment—Severance of Partnership Interest—Deed pendente Lite—Notice—Lien—Voluntary Deed Void against Creditors—Dower—Partition.

Action for partition or sale of lands in the city of Windsor.

A. H. Clarke, K.C., for plaintiffs.

E. S. Wigle, Windsor, for defendant Jane McBride.

J. L. Murphy, Windsor, for defendant John McGregor.

J. E. O'Connor, Windsor, for defendant Elizabeth McGregor.

FALCONBRIDGE, C.J.—(1) An undivided half interest in the Windsor real estate is a partnership asset, and on the winding-up of the affairs of the partnership the proceeds thereof are first applicable in discharge of the debts of the firm, and then of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm, i.e., the claims of one partner against the other on an accounting: *Lindley on Partnership*, 5th ed., p. 352. (2) Therefore it is liable to answer the amount which under the judgments of the Michigan Courts will be payable to Thomas McGregor. (3) For the decree of the Supreme Court of Michigan should be held binding upon these parties in this Court. The parties were all within the jurisdiction of the foreign Court, and as defendant John McGregor invoked and submitted to the jurisdiction of that Court, he has precluded himself from setting up want of jurisdiction: *Swazie v. Swazie*, 31 O. R. 324; and if any amendment be necessary, it will be granted. (4) The Windsor real estate did not cease to be partnership property on the withdrawal of John McGregor senior, or at the death of Donald McGregor. The evidence does not shew any agreement or other state of facts whereby there was any severance of the partnership interest of John and Thomas in the undivided one-half remaining. (5) The deed to Elizabeth McGregor was given pendente lite, with full notice to her and without consideration, and is bound by the judgment subjecting the conveyance to her to the lien of Thomas McGregor. Being admittedly voluntary and without consideration, it is also fraudulent and void against Thomas McGregor in respect of his lien on the partnership property, and also fraudulent and void against Thomas McGregor and other creditors of John McGregor, in respect of the undivided interest of John McGregor not subject to the lien. Leave to plaintiffs to amend as to these two-twenths by suing on behalf of themselves and all other creditors of John McGregor. (6) The defendant Elizabeth McGregor is not entitled to dower, because the land is a partnership asset, and because she now holds the property in her own name, the conveyance being still good as between her and her husband. Judgment generally in favour of plaintiffs for partition or sale, with declarations in accordance with the above findings. Defendants John McGregor and Elizabeth McGregor to pay costs of action of plaintiffs and defendant Jane McBride.

MEREDITH, J.

FEBRUARY 3RD, 1903.

CHAMBERS.

NOLAN v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Life Insurance—Action on Policy—Condition as to Award—Application to Stay Proceedings.

An appeal by defendants from order of Master in Chambers (1 O. W. R. 777), refusing to stay proceedings in an action on a policy of life insurance, notwithstanding a condition in the policy as to an award.

H. Cassels, K.C., for defendants.

S. Alfred Jones, for plaintiff.

MEREDITH, J.—The rule applicable to this case is well settled; the difficulty is in applying it.

The jurisdiction of the Court cannot be ousted as to a cause of action which has arisen; but where no cause of action has arisen there is no jurisdiction.

In the circumstances of this case, if liability to pay has arisen, no words of the parties or either of them can prevent the Court giving relief, but if no liability to pay arises until after award the action is premature.

Less is gained by seeking to follow the reasoning of any one Judge against that of any other, expressed in the case of *Scott v. Avery*, 5 H. L. Cas. 811, or in any other case, than by looking at what was actually decided in the case, and for the results which, according to binding authority, flow from the decision in *Scott v. Avery*.

Upon the face of the policy the contract to pay is made subject to the conditions indorsed upon it, as conditions precedent: and in the 15th of such conditions it is provided that the obtaining of an award, as therein provided, shall be a condition precedent to liability to pay any claim under the policy, and to the enforcement of it. In other words, the liability is upon the award and policy, not upon the latter alone.

Caledonia Ins. Co. v. Gilmour, [1893] A. C. 85, and *Spurrier v. La Cloche*, [1900] A. C. 446. referred to.

Under the Arbitration Act the Court has power to further the plaintiff's claim effectually, if the defendants fail, or unduly delay, to comply with the terms of the contract: but it has no power to compel payment before reference and award, contrary to the contract, upon which the obligation to pay does not arise until after reference and award.

The application is not one made to the discretion of the Court under sec. 6 of the Arbitration Act, but is one based upon a denial of any right of action in the plaintiff.

The logical result is that the action, being premature, ought to be dismissed, but that is not asked for, and can better be done, and all question of costs better dealt with, after the award—having regard, among other things, to the condition requiring legal proceedings to be commenced within one year.

There is no question of fact in dispute; the one question is that which has been considered, a question of law plainly arising upon the policy, and neither party desired to go to trial to have it there considered; it may as well, therefore, be determined upon this summary motion.

There is nothing in the point that the plaintiff is not one of the contracting parties. She is suing upon the policy, and if she can recover at all it must be upon the contract contained in it.

Appeal allowed; and proceedings stayed, and costs reserved, until after award, but with liberty to apply meanwhile if necessary.

MEREDITH, J.

FEBRUARY 3RD, 1903.

CHAMBERS.

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

Writ of Summons—Service—Unincorporated Foreign Voluntary Association—International Association—Service upon Executive Officer in Ontario—Conditional Appearance—Question of Incorporation—Pleading—Trial.

Appeal by defendants from order of Master in Chambers, ante 26, dismissing a motion to set aside the writ of summons and service thereof upon one D. A. Carey for defendants.

J. G. O'Donoghue, for defendants.

C. A. Moss, for plaintiff.

MEREDITH, J.—The defendants the American Federation of Musicians were originally sued as an incorporated body; as such an interim injunction was made against them; upon motion to continue that injunction—notice of which was apparently served upon them in the same manner as this writ—they appeared by counsel and shewed cause against it, but an order was made continuing the injunction until the trial; and leave was also given to the plaintiff to proceed against certain members of the "Federation," as representing all; and

the plaintiff's action is now against the "Federation" as a corporate body, or, in the alternative, against the members as an unincorporated body.

The ground of this motion is that the "Federation" is neither a corporate body nor a co-partnership, in effect that they have no legal status and so cannot be served or sued; but the same question must have been raised upon the motion to continue the injunction, and was not given effect to, and is the proper subject of an issue; so that what the Master was asked to do was to hold, without trial, upon a summary application, that no action lies against these defendants.

That he rightly refused to do, leaving the question for trial and adjudication in the ordinary way.

The usual and proper mode of raising, in the common law Courts, such a defence was by plea of nul tiel corporation, and under ordinary circumstances it should now be raised by statement of defence of the same character; though it may be that in some exceptional cases it might be disposed of on summary motion: see *Mason v. Holmes*, 30 Misc. R. (N. Y.) 19.

In this case the plaintiffs will allege and these defendants deny as a matter of fact that these defendants are a corporate body or have some legal entity. The question does not depend upon the construction of some legislation, or of some writing, but is purely one of fact—whether the "Federation" has actually been incorporated under the laws of this or of some other country. It is far from proof of their nonentity that the person served *believes* they are not incorporated, and has had a telegram to that effect. Much more light is needed upon the question, and that can be best given at the trial.

Cases to which the Master was not referred, quite sustain his ruling: see *Williams v. The Commissioners, &c.*, 11 C. B. 420, and *McSherry v. The Commissioners, &c.*, 45 U. C. R. 240. *Tewman v. The Governor, &c.*, 3 C. P. D. 563, is a peculiar case, and not really in conflict with the others.

Once rid, for the purpose of this motion, of the point that these defendants cannot be served in any way, because they have no legal capacity, the case presents no difficulty. The person served is the proper person to be served. These defendants carry on their business or operations in this Province just the same as elsewhere, and that person is their highest officer in this large district. The service in no way prejudicially affects these defendants' right to contend that they are not subject to any judgment, rather it aids in having the question of the legal capacity or want of legal capacity fairly and rightly determined.

Appeal dismissed; costs to the plaintiff, only, in the action.

MEREDITH, J.

FEBRUARY 3RD, 1903.

CHAMBERS.

RE BROWN AND SLATER.

Will—Construction—Devise—Life Estate—Estate Tail—Survivorship—Disentailing Deed not Acted upon—Condition as to Continuing to Bear Testator's Name—Conveyance to Trustee—Title—Vendor and Purchaser.

Motion by Mary Brown, the vendor, under the Vendors and Purchasers Act, for an order declaring that she is the owner in fee simple of the north halves of lots 4 and 5 in the 3rd concession of the township of East Flamborough, and as such entitled and able to make a valid conveyance thereof in fee simple to the purchaser, John Slater; that the disentailing deed and marriage settlement made between Alexander Brown and others and John Sproat on the 8th October, 1870, and registered on the 26th November, 1870, forms no cloud upon Mary Brown's title to the lands; and for such other order as may seem just.

By the will of Alexander Brown, made on the 29th December, 1842, whereof letters probate issued on the 9th October, 1852, the lands in question were devised to the testator's son, also named Alexander Brown, "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever; and in default of a second male heir to their eldest surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life."

The vendor on the 21st January, 1903, made a statutory declaration that she was the eldest and only surviving daughter of Alexander Brown the younger, who died on the 31st July, 1880; that, under the devise in the will of Alexander Brown the elder, she became the owner of the lands in question; that her sisters, Martha Marion Brown, and Eliza Brown, afterwards Sproat, both predeceased their father; that immediately upon his death she (the declarant) entered into possession of the lands in question, and had been in undisputed possession ever since.

It also appeared that Alexander Brown the younger had one son who survived him.

The disentailing deed and marriage settlement above referred to were made at the time of the marriage of Eliza Brown, she being then, as recited, "tenant in tail in remainder immediately expectant upon the decease of the said Alexander Brown, her father."

A subsequent disentailing deed was made on the 31st January, 1877, by Alexander Brown and Mary Brown, the vendor, to a trustee for the benefit of Mary Brown.

A. W. Brown, Hamilton, for vendor.

W. T. Evans, Hamilton, for purchaser.

MEREDITH, J.—The first objection to the vendor's title is that the devisee Alexander Brown took, under the will, an estate tail, and by deed effectually barred the entail.

If that were so, then the vendor would seem to have title by length of possession.

But, in my opinion, that devisee took a life estate only, and the estate tail male is devised to the vendor, she being the only daughter of that devisee, and "his present wife," who survived them. The survivorship is clearly of that devisee and his said wife, not of the testator.

Whether the word "now" refers to the date of the will, or, as more likely, to the time of the testator's death, the recitals in the deeds, the declaration furnished, and the possession of the land since the testator's death, shew that the land in question is that comprised in the devise in question.

It is to be observed that neither that devisee nor any one else seems ever, until after the contract in question was made, to have claimed or supposed that he took more than a life estate, or that the land in question is not that which the testator described as that whereon he "now" resides. The deed in question was executed by that devisee as life tenant, and he is therein recited to be, and is throughout described as, such.

The deed in question was made and registered in the year 1870; there seems to have never been any possession, or claim of any character made, under it; and, being on the face of the registered title deeds ineffectual, it does not stand in the way of the completion of the purchase. It would be different if any claim were being made under it so that the case would be one of selling and buying a lawsuit, as well as the land, if the contract were carried out.

Then as to the objection upon the ground that the devise to the vendor is subject to the provision that she continues to bear the testator's name during her life. There has been no breach of it yet; and it is said that such a condition cannot be attached to an estate in fee simple, and that a tenant in tail by barring the entail and enlarging his estate into a fee simple defeats a condition for taking and using the testator's name: see Jarman on Wills, 5th ed., pp. 890 and 900, and *Re Cornwallis*, 32 Ch. D. 388; and from one point of view at all events there appears to be a restriction of the

power of alienation quite antagonistic to the quality of an estate in fee simple. The devisee cannot sell, mortgage, lease, or otherwise dispose of the land effectually because up to the last moment of her life her name may be changed. I give effect to the view of the law cited. The devisee is hardly likely at this late day to disregard or to have any occasion for disregarding the testator's wishes in this respect. See *Bird v. Johnston*, 16 Jur. 976.

Mr. Evans's last point taken upon the argument was that the vendor had conveyed the lands to a trustee and so had not the legal estate. No objection of this character seems to have been previously taken; the grantee seems to be but a bare trustee for the vendor, and I do not understand that there is any objection on her part to procure a conveyance from him to the purchaser; the matter seems one of conveyancing merely, and in regard to which there is no contention between the parties.

Notwithstanding anything that has been urged against it, the vendor has, in my opinion, shewn a good title to the land in question. By agreement between the parties there is to be no order as to costs.

MEREDITH, J.

FEBRUARY 3RD, 1903.

CHAMBERS.

RE LLOYD AND PEGG.

Arbitration and Award—Order for Enforcement of Award—Time for Application—Necessity for Order—Construction of Arbitration Act—Objections to Award—Misconduct of Arbitrator—Evidence.

Appeal by plaintiff against an order of the Master in Chambers, made under sec. 13 of the Arbitration Act, giving leave to enforce an award in the same manner as a judgment or order of the Court to the same effect may be enforced.

The grounds of the appeal were: (1) that the application should have been, but was not, made within six weeks after the publication of the award, there having been no extension of the time under special circumstances; (2) that no order was necessary; and (3) that the award was manifestly unjust in these respects, (a) because evidence was taken, in the absence of the appellant, by the arbitrator, and (b) because the award erroneously allowed the respondent \$200 in respect of the Winar transaction and \$550 in respect of the Sheppard transaction.

A. B. Armstrong, for appellant.

R. L. Johnston, for Lloyd.

MEREDITH, J.—The contention is, that sec. 45 of the Act covers an application of this character—for leave to enforce an award—but that is not so. The section applies to all applications to set aside an award, but not including an appeal against an award, which secs. 14 and 34 provide shall not be made after the expiration of 14 days from the filing of it, except by leave under special circumstances. The omission of a comma at the end of the first line of the section in its last two enactments cannot be permitted to destroy or very largely alter its meaning. All applications—all what applications? The appellants say all applications under the Act; but why read in the last three words? It cannot mean all applications under the Act, for some provided for in it are to be made before award, even before the reference. The next preceding section deals with “any appeal or motion to set aside an award.” Plainly “all applications” means all applications of that character. It is not very accurate to say “an appeal to set aside an award;” but in dealing with motions to set aside awards care is taken, perhaps needless care, to exclude, from all applications to set aside an award, an appeal against an award under secs. 14 and 33. To be strictly right from a grammatical point of view the section is to be read as it originally was, or better still thus:—All applications to set aside an award (but not including an appeal against an award) made on a submission, shall be made, etc.

The second contention ends when it is said that the reference was one made out of Court—not in any cause or matter in any Court.

And as to the other grounds; it is not even asserted that the appellant had not due notice of the appointments upon which it is said evidence was taken in his absence, such notice as would justify the arbitrator in proceeding *ex parte*, and the items in regard to which error is alleged were apparently fully gone into in the evidence taken, and in the arguments of counsel for all parties had, before the arbitrator. These matters were properly the subject of a motion against the award if really considered of any consequence; but no motion has been made against it, and these alleged injustices are put forward only when proceedings to enforce the award became troublesome. They ought not to delay the order now, but a refusal to give any effect to them upon this motion is not to and will not prejudice any other proper use the appellant may be able to make of them.

Appeal dismissed with costs.

MEREDITH, J.

FEBRUARY 3RD, 1903.

CHAMBERS.

RE McNICHOL.

Will—Construction—Life Estate—Remainder—Vested Interests of Remaindermen—Representatives of Remaindermen Dying before Period of Distribution.

Application by the executors of the will of John McNichol under Rule 938 for an order ascertaining the class of legatees amongst whom is to be divided the moiety of proceeds of the sale of the farm of the testator first referred to in the following extract from his will: "In the event of my daughter dying without heirs of her own body, and after the death of both her and her mother, my wife, the farm to be sold, and the proceeds divided, one equal half to be divided among my brothers and sisters, and the other equal half to be willed to whomsoever my beloved wife pleaseth to bequeath it."

The testator died on the 14th November, 1870; his daughter died 10th December, 1888, without heirs of her body, not having been married; and the testator's widow died on the 4th September, 1902.

Seven of the brothers and sisters of the testator survived him, but three of them died before the widow.

W. L. Walsh, Orangeville, for the executors.

W. E. Middleton, for the representatives of Benson McNichol, a deceased brother of the testator, cited *Re Harman*, [1897] 2 Ch. 39.

F. W. Harcourt, for the infants, referred to Jarman on Wills, 5th ed., pp. 1010-11; Theobald on Wills, 5th ed., p. 277.

MEREDITH, J.—The gift is, in effect, in the events which have happened, to the daughter for life, with remainder, as to the proceeds of one-half of the farm, to the brothers and sisters.

The brothers and sisters living at the testator's death took vested interests, and each became entitled to an equal share in such proceeds, together with other brothers or sister (if any) born before the period of distribution. The estate of any of such brothers or sisters as have died since the testator, is entitled to the deceased's share: see *Stanley v. Wise*, 2 Camp. 482, and *Baldwin v. Rogers*, 3 DeG. M. & G. 649.

If any conclusion adverse to the persons who are interested and have not been served with notice of this motion had been reached, no order would have been made without notice to at least some of them.

Order accordingly. Costs out of the fund.

FALCONBRIDGE, C.J.

FEBRUARY 3RD, 1903.

TRIAL.

MURPHY v. BRODIE.

Principal and Agent—Purchase of Land by Agent—Account—Mortgage—Release of Surety.

Action for compensation, indemnity, an account, and payment of what is due to plaintiff, in respect of a purchase of land made by plaintiff for defendants.

J. E. O'Connor, Windsor, for plaintiff.

F. E. Hodgins, K.C., for defendant Brodie.

F. D. Davis, Windsor, for defendant Stuart.

FALCONBRIDGE, C.J., held that defendant Brodie had no independent advice, but relied on plaintiff as his solicitor. The full and accurate details of the extraordinary arrangement of the \$2,900 mortgage were never disclosed to Brodie, and when the mortgage was executed it was a different one from any mortgage "to secure balance of purchase money" which could have been contemplated. This effects a release of defendant Brodie, who was a surety for Margaret Stuart. Further, there have been subsequent dealings of plaintiff with the matter which would alter Brodie's position and render it impossible for plaintiff, on being paid off by Brodie, to transfer to him the securities to which Brodie would then be entitled. Action as against Brodie dismissed with costs. Judgment for plaintiff against the estate of the late Margaret Stuart for an account. On taking the account the mortgage to McLaughlin to be declared to be a mortgage for \$700 only, and the mortgage to plaintiff a mortgage for \$500 only. The Master also to take an account of rents and profits received or which should have been received, and of rent due by estate of Margaret Stuart. Plaintiff to convey to defendant executor on payment of amount found due. Further directions and costs of this action reserved until after report.

FEBRUARY 3RD, 1903.

DIVISIONAL COURT.

REX v. SWANTON.

Municipal Corporations—By-law Governing Hawkers—Conviction—Form of—Imprisonment for Costs—Evidence of Breach of By-law.

Motion to make absolute a rule nisi to quash a conviction of defendant, made by the police magistrate for the town of Paris, for a breach of a town by-law for licensing, regulating,

and governing "hawkers, pedlars, or petty chapmen," passed under sec. 583 (4) of the Municipal Act.

E. E. A. DuVernet, for defendant.

G. H. Watson, K.C., for complainant.

THE COURT (MEREDITH, C.J., MACLAREN, J.A.), held that the conviction was not bad on its face because it directed imprisonment in default of payment of both fine and costs and of sufficient distress, the conviction being in the form prescribed by sec. 707 of the Municipal Act, and the by-law following the words of sec. 702: see *Regina v. Johnson*, 8 Q. B. 102; *Reid v. McWhinnie*, 27 U. C. R. at p. 293; R. S. O. ch. 90, sec. 5. *Regina v. McMillan* (Divisional Court, 12th January, 1901), distinguished. The Court also held that it could not be said that there was no evidence of a breach of the by-law having been committed by defendant. Rule nisi discharged with costs.

FEBRUARY 3RD, 1903.

DIVISIONAL COURT.

JONES v. LAKEFIELD CEMENT CO.

Conversion—Leave and License—Findings of Trial Judge—Refusal of Appellate Court to Interfere.

Appeal by plaintiff from judgment of BRITTON, J., dismissing the action, which was brought to recover damages for the conversion of a certain derrick and derrick-masts, guy-ropes, etc., taken by defendants from the plaintiff's quarries on Eagle Mount island in Stoney lake. The defendants took the goods to their works at Young's Point, and kept them until after action. They justified by leave and license of plaintiff.

W. R. Smyth, for plaintiff, contended on the evidence that the finding of the trial Judge was wrong.

• G. H. Watson, K.C., for defendants, contra.

THE COURT (MEREDITH, C.J., MACLAREN, J.A.), held that it was impossible, with a proper regard to what was due to the findings of a Judge who had seen the witnesses, heard the evidence, and come to his conclusion on conflicting testimony, to interfere with the result that had been reached. Appeal dismissed with costs.

FEBRUARY 3RD, 1903.

DIVISIONAL COURT.

WILCOX v. CALVER.

*Covenant—Restraint of Trade—Construction of Covenant—
Territorial Limit—"In."*

Appeal by defendant from judgment of STREET, J., in favour of plaintiff in an action for damages for breach of a covenant in restraint of trade. The question was whether defendant's covenant, given to plaintiff on the sale of an interest in a hotel in the city of St. Thomas, extended to the premises in which defendant was, at the time the action was brought, carrying on the business of hotel-keeping. By the covenant defendant agreed "not to enter into the business of hotel-keeping, for the period of five years, east of the London and Port Stanley Railway in the city of St. Thomas." The premises in which defendant was carrying on business were upon a half acre of land which did not form part of the city as its limits were fixed by law, but was part of the township of Yarmouth, though entirely cut off from the rest of the township and surrounded on all sides by the city.

E. E. A. DuVernet, for appellant.

Joseph Montgomery and A. Grant, St. Thomas, for plaintiff.

THE COURT (MEREDITH, C.J., FALCONBRIDGE, C.J.), held that the prohibited district is the area which has for its westerly limit the line of the London and Port Stanley Railway and extends thence easterly to the easterly boundary of the city, and is bounded on its other sides by the boundary lines, on those sides, of that city. The half acre is in the city in the sense in which "in" is used in the covenant, which is the same sense in which one would speak of Pelee island being in lake Erie. *Mallan v. May*, 13 M. & W. 511, distinguished.

Appeal dismissed with costs.

WINCHESTER, MASTER.

FEBRUARY 4TH, 1903.

CHAMBERS.

REX EX REL. WARR v. WALSH.

Municipal Elections—Election of Councillors by Acclamation—Nomination Meeting—Hour for—Disobedience of Statute—Imperative Provision—By-law—Irregularity—Saving Clause.

Motion by relator to set aside the election by acclamation of Edward J. Walsh, Joseph Allen, Thomas Mara, Manton

Treadgold, John Fingland, and Richard Ashley, as councillors for the town of Brampton, upon the ground that the nomination of candidates for councillors was held at 10 o'clock in the forenoon of Monday, 29th December, 1902, for one hour, instead of at noon of the same day.

E. G. Graham, Brampton, for relator.

T. J. Blain, Brampton, for respondents.

THE MASTER held that the Legislature having by sec. 119 of the Municipal Act, expressly fixed the hour of noon for such nominations, the council had no power by by-law or otherwise to alter the hour. The time of holding an election is a matter of substance; the nomination is the commencement of the election. The authority to hold an election at one time will not warrant an election at another time: *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 10, p. 679; *Re East Simcoe Election*, 1 Ont. Elec. Cas. 291, 308-322, 336-7. The provision of the statute is not merely directory, but imperative. The holding the election at the wrong hour is not a mere irregularity coming within sec. 204 of the Act, the "saving clause."

Order made setting aside the election and directing the holding of a new election, with costs.

STREET, J.

FEBRUARY 4TH, 1903.

CHAMBERS.

RE POLLOCK.

Will—Bequest to Widow during Widowhood—Dower—Election—Acceptance of Benefit—Intestacy—Discretionary Power to Sell—Conversion of Realty into Personality.

Application by executors and widow of James Pollock, deceased, from an order declaring construction of will. Testator died 29th August, 1898, leaving widow and two infant children. By the will he devised and bequeathed all his real and personal estate as follows: "First, my wife shall have the sole use of all my real estate and personal property . . . or so much of the same as shall be necessary for the proper maintenance of herself and my two sons . . . as long as she remains my widow or until my eldest son . . . comes of the full age of 21 years, and in the event of my wife ceasing to be my widow, her maintenance shall cease. . . . Second, when my eldest son arrives at the full age of twenty-one years I direct that he shall receive one-third of my real estate and one-half of my personal property or an equivalent value thereof, and that an equal share . . . shall be held in trust by my executors for my executors for my second son . . . until he comes of the full age of 21 years. Third, I further

direct that in the event of either of my sons dying before coming of age the surviving son shall receive the share of his deceased brother. Fourth, . . . my executors shall have the power . . . to sell . . . my real estate or personal property, and the proceeds shall be invested and held in trust for the use of my heirs as hereinbefore provided, and said proceeds shall be subject to the same conditions as hereinbefore provided."

W. Proudfoot, K.C., for the executors and widow.

F. W. Harcourt, for the infants.

STREET, J., held, following *Laidlaw v. Jackes*, 22 Gr. 171. 25 Gr. 293, 27 G. R. 101, that the terms of the will are not such as to put the widow to her election, and she is entitled to the benefit of the provisions of the will in her favour and also to her dower. The benefits under the will have come to an end by her marriage, but she is not to be taken to have deprived herself of her right to dower by her having taken them prior to her second marriage. There is an intestacy as to one-third of the real estate, and, subject to the widow's dower, it belongs to the two sons in equal shares absolutely as it was not required apparently for payment of debts. The discretionary power to sell did not effect a conversion of the realty into personalty. Order declaring accordingly. Costs out of the estate.

FEBRUARY 4TH, 1903.

DIVISIONAL COURT.

DEACON v. WEBB.

Payment on Mortgage—Appropriation on Principal though Interest Overdue—Subsequent Attempted Variation.

Appeal by defendant from judgment of County Court of Frontenac, in favour of plaintiff for \$304.25 in an action upon the covenant for payment contained in a mortgage deed. The defence was payment.

J. J. Maclellan, for defendant, contended that the plaintiff had made an application of a payment upon principal, instead of, as he might have done, upon overdue interest, and was bound by that appropriation, having notified the defendant of it, and having in this action made her claim upon the basis of that appropriation, citing *Fraser v. Locie*, 10 Gr. 207; *Hooper v. Kay*, 1 Q. B. D. 178; *Leake on Contracts*, 4th ed., p. 652; *Addison on Contracts*, 9th ed., p. 149.

W. E. Middleton, for plaintiff, contended that it was not a case of appropriation of payments, but a mistake in making

out an account, which the plaintiff could correct at any time before judgment, and that plaintiff was not bound by a mistake made by her solicitor and agent: *McGregor v. Gaulin*, 4 U. C. R. 378.

THE COURT (MEREDITH, C.J., FALCONBRIDGE, C.J.), held, distinguishing that case, that the appellant's contention must prevail. It was not open to doubt that the mortgagor when making the payment of \$700 was entitled to stipulate that it should go in reduction of the principal money, and that no part of it should be applied upon the interest. The mortgagee might have refused to accept a part payment on these terms, but, if she chose to accept it, she was bound to apply it as the mortgagor directed. The proper inference from the facts was, that the mortgagor did, when making the payment, direct it to be applied in reduction of the principal, and that the mortgagee received it on these terms; or, at any rate, there was an application by the mortgagee's agent of the whole \$700 to the principal, and that appropriation, having been communicated to the mortgagor, became binding on the mortgagee, and could not afterwards be changed.

Judgment varied by reducing the amount of recovery to \$236.65, with interest on \$100 from the date of the writ of summons to the date of the judgment. No costs of appeal.

FEBRUARY 5TH, 1903.

DIVISIONAL COURT.

McLEAN v. ROBERTSON.

Public Schools—Change of School Site—Adoption by Trustees—Ratepayers' Meeting—Resolution—Minutes—Inspector—Arbitration—Resolution of Ratepayers—Poll—Voters.

Appeal by plaintiffs from judgment (1 O. W. R. 578) of F. A. ANGLIN, K.C. (sitting for FERGUSON, J.), dismissing with costs an action by three ratepayers of a school section in Manitoulin Island, on behalf of themselves and all other ratepayers, against two of the trustees as such and as individuals and against the school board to restrain the board from disposing of a school house called the new school house, from erecting a new building on the old school site, and from altering, repairing, or adding to what is called the old school house, and for certain declarations of right as to the validity of resolutions and meetings of the board.

A. B. Aylesworth, K.C., and W. H. Williams, Gore Bay, for plaintiffs.

A. G. Murray, Gore Bay, for defendants.

THE COURT (MEREDITH, C.J., MACMAHON, J.), agreed with the judgment of the learned King's Counsel on all the questions raised by the appeal.

Appeal dismissed with costs.

FEBRUARY 5TH, 1903.

DIVISIONAL COURT.

YOUNGSON v. STEWART.

Partnership — Taking Accounts — Charging Partner with Payment — Evidence of Partner in Master's Office. — Attempt by him to Contradict his own Statements — Evidence — Books.

Appeal by defendant Hopkins from an order of STREET, J., allowing in part an appeal from the report of the local Master at Hamilton in a partnership action.

S. F. Washington, K.C., and H. H. Robertson, Hamilton, for appellant.

G. Lynch-Staunton, K.C., and T. Hobson, Hamilton, for respondent, defendant Stewart.

The judgment of the Court (BOYD, C., MEREDITH, J.), was delivered by

MEREDITH, J.—This litigation has resolved itself into a contest between the appellant and respondent only.

And, in regard to the second ground of this appeal, the respondent contended in the Master's office that the appellant should be charged with the sum of \$100, one-half of an amount paid out of the copartnership moneys to one Lewis; the Master disallowed the claim, but upon appeal it was allowed.

It is now admitted that the sum of \$200 was paid to Lewis, and that a moiety of that payment should have been repaid by the appellant.

The claim was denied by the appellant in the Master's office, and thereupon the respondent was examined as a witness for the purpose of proving it, as well as every other matter in dispute between these parties; but, instead of making good the claim, he testified, in effect, that there had been a settlement of accounts between him and the appellant in which the sum in question had been charged against and satisfied by, the latter; his own words are, "a balance of \$100 that Hopkins owed on the Lewis account was deducted from the \$205.24, and this left \$105.24."

No other evidence but that of the appellant in denial of the claim was given upon this item.

But it is now urged by counsel for the respondent that his client erred in his testimony and that the copartnership books and some memoranda upon the back of a blank form of promissory note and of a deposit slip, shew this.

There are two answers, however, to this contention. (1) Although the reference lasted a very long time after the evidence of the respondent was given, and although this is the second appeal since the Master made his report, no attempt of any kind has been at any time made to correct upon oath the alleged mistake. So that there is the oath of the respondent, unretracted in any manner by him, against the assertion of counsel representing him, without even a suggestion from the client of any mistake or of any desire to be released. This to my mind is an abundantly sufficient answer to the contention. But (2) neither the books nor the memoranda in their figures shew any mistake; on the contrary, they may be looked upon as confirming the evidence; though it must be said that the books seem to have been ill kept, and neither they nor the memoranda would, unaided by evidence, demonstrate anything decisive upon this question.

Both, however, do shew that at the time of the settlement the balance in the books to the credit of the appellant was \$205.24; and that that sum was reduced to \$105.24 by deducting from it the very sum of \$100 with which it is now sought to charge the appellant again; and so confirm the respondent's evidence upon the point. The words in pencil on the deposit slip are not verified in any manner, and are not evidence.

That there was a settlement between these two parties in which the \$100 was taken into consideration and account cannot be denied; all the evidence and figures shew this, and the respondent has admitted upon oath that such was the fact, that in that settlement the appellant paid the sum in question; it is quite too much, in the face of all this, to give after seven years, to any manipulation of the figures, with a view to shew that all that appears as before mentioned is false to unverified words appearing in a

round is allowed; and the Master's report of it will stand.

If appeal were disposed of on the argument; there will be no order as to costs.

FEBRUARY 6TH, 1903.

DIVISIONAL COURT.

NEELY v. PETER.

*Water and Watercourses—Injury to Land by Flooding—
Claim for Damages—Summary Procedure—Costs of Ac-
tion—Dam—Tolls—Injunction.*

Appeal by plaintiff from judgment of STREET, J. (4 O. L. R. 293, 1 O. W. R. 499), in so far as it was against plaintiff in an action for damages for flooding plaintiff's land, and for an injunction.

O. M. Arnold, Bracebridge, for appellant.

W. L. Haight, Parry Sound, for defendants.

THE COURT (MEREDITH, C.J., FALCONBRIDGE, C.J.), agreed with the judgment below and the reasons for it, but was of opinion that, in addition to the damages which were awarded to him, the plaintiff was entitled to an injunction as against the defendants the Parry Sound River Improvement Company, but the operation of it should be suspended for a year in order to enable these defendants to acquire the right to overflow plaintiff's land under R. S. O. ch. 194, and the judgment should be varied accordingly. No variation as to costs below, and no costs of appeal to either party.

FEBRUARY 6TH, 1903.

DIVISIONAL COURT.

WOODRUFF v. ECLIPSE OFFICE FURNITURE CO.
OF OTTAWA.

*Security for Costs—Application for Increased Security after
Trial Practically Concluded—No Application at Trial.*

Appeal by defendant company from order of BRITTON, J., ante 35, reversing an order of the local Master at Ottawa requiring plaintiff to give increased security for costs of defendant company.

The appeal was heard by BOYD, C., MEREDITH, J.

G. Bell, for appellants.

F. A. Magee, Ottawa, for plaintiff.

BOYD, C.—The action is practically standing for judgment as to the original defendants. As to the new defendants, the only defence open has practically been exhausted in the

case of the original defendants, but as to them the usual order for security for costs has been made against the absent plaintiff. The defendants are all in the same interest, and no further costs in the way of evidence need be incurred by the original defendants unless they insist on all the evidence originally given being given over again.

The Judge who tried the case as against the original defendants is not impressed with the merits of the defence, as he expressed himself at the hearing; so that no harm appears to be done to the original defendants by affirming the order of Britton, J.

MEREDITH, J.—We have conferred with the learned trial Judge as to matters which were left in doubt upon the argument, and he informs us that, upon speaking to the minutes of the order made at the trial. it was agreed, as he understood, that, although an application for security for costs might be made on behalf of the added defendants, there was to be no application for additional security to the original defendants; that the case is one in which, had additional security been sought as a term of giving leave to amend and of postponing the trial or otherwise, he would have unhesitatingly refused it; that the case is one in which the plaintiff is undoubtedly entitled to recover a considerable sum of money either from the original or the added defendants, the latter being largely interested in the former, the question being mainly, if not entirely, whether the incorporated company or its promoters, now large shareholders, are technically answerable for the debt; and that the further trial of the case was directed to be before him.

In these circumstances, the order in question, which was made by Britton, J., after a like conference with the trial Judge, cannot be disturbed; otherwise the Master's order would have been right. *Standard Trading Co. v. Seybold*, 1 O. W. R. 783.

Appeal dismissed; costs in the cause.

FEBRUARY 6TH, 1903.

DIVISIONAL COURT.

SALE v. WATT.

*Costs—Action by Solicitor to Recover—Reference in Action
—Costs of Action and Reference.*

Appeal by defendants from judgment on further directions pronounced by GARROW, J.A., sitting as a Judge of the

High Court, disposing of the costs in two actions on bills of costs brought by solicitors against their clients. A reference was directed to the local taxing officer at Windsor to tax the bills, and further directions and costs of the action and reference were reversed. The local officer made his report, from which both plaintiffs and defendants appealed. Upon the appeals MEREDITH, J., sent the bills for revision to Mr. Thorn, senior taxing officer at Toronto, and afterwards adopted his report and disposed of the appeals. Upon motion for judgment on further directions GARROW, J.A., gave judgment in terms of the report as varied upon the appeal, and awarded plaintiffs the costs of the action and reference.

The appeal was heard by BOYD, C., MEREDITH, J.

R. U. McPherson, for defendants.

F. A. Anglin, K.C., for plaintiffs.

BOYD, C.—I think the disposal of the costs of reference came up to be dealt with as on further directions by the Judge, and were not subject to the provisions of Rule 1185, which applies to summary proceedings, and not to cases where a writ has been issued and a judgment given in which the costs of action are reserved till after the report of the taxing officer.

This indeed has been already determined in this case upon the appeal to my brother Meredith.

The costs of reference as part of the costs of action have been given to the solicitor by my brother Garrow, and no ground has been pointed out which would justify us in interfering with his discretion.

The costs of that reference should be subject to close scrutiny, as it appears inexplicable why 27 days as alleged should have been occupied in taxing the bills of costs now in question.

In view of this burden to be borne by the client, I would not give costs of this appeal to the solicitors.

MEREDITH, J.—I agree in the result.

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STREET, J.

JANUARY 26TH, 1903.

TRIAL.

BLACK v. IMPERIAL BOOK CO.

Copyright—Foreign Reprints—Notice to Commissioners of Customs.

The judgment delivered 21st November, 1902, 1 O. W. R. 743, was recalled; and judgment was now given holding that sec. 152 of the Imperial Customs Law Consolidation Act, 1876, mentioned in the former report, is not in force in this Province, notwithstanding the expression of opinion of the Commissioners in part iv. of the appendix to volume 3 of the Revised Statutes of Ontario, 1897, to the effect that that section is in force; and that the plaintiffs had established their right to an injunction perpetually restraining the defendants the Imperial Book Company from importing into Canada any copies of the 9th edition of the Encyclopædia Britannica, and for delivery up, and for an account.

Held, also, that the production of a certified copy of the entry in the book of Registry at Stationers' Hall is all that is necessary to make out a prima facie proprietorship in the copyright of an Encyclopædia, under secs. 18 and 19 of the Imperial Copyright Act, 1842, and it is not necessary, for such prima facie case, to prove by direct evidence other than the copy of the entry, the facts which by secs. 18 and 19 are made conditions precedent to the vesting of the copyright in one who is in not the author.

W. Barwick, K.C., and J. H. Moss, for the plaintiffs.

S. H. Blake, K.C., and W. E. Raney, for the defendants the Imperial Book Company.

A. Mills, for the defendant Hales.

BRITTON, J.

FEBRUARY 9TH, 1903.

CHAMBERS.

SMELLIE v. WATSON.

Appeal—Master's Report—Time Expired—Leave to Appeal
—Rule 353—Terms—Costs.

Motion by defendant for leave to serve notice of motion by way of appeal from the report of the local Master at Guelph, dated 7th January, 1903, filed 12th January, 1903.

D. O. Cameron, for defendant.

W. H. Kingston, K.C., for plaintiff.

BRITTON, J.—Rule 353 should receive a liberal construction, and the application should be granted. Upon the defendant paying into Court the sum of \$150 to the credit of this cause, as security to the plaintiff in the event of plaintiff's ultimate success, and upon payment by the defendant of the costs of this application, the order may go for leave to serve notice of appeal. The money to be paid into Court, and the costs of this application to be paid, and notice to be served, on or before the 16th February, 1903. The plaintiff's costs of moving to confirm report already incurred, except so far as covered by the costs of the 3rd inst., already paid, to be costs in the cause to the plaintiff, in any event. If the defendant abandons, or does not proceed with his appeal, the costs of this motion to be costs in the cause to plaintiff.

BRITTON, J.

FEBRUARY 9TH, 1903.

CHAMBERS.

McKELVEY v. CHILMAN.

Costs—Scale of—Action for Trespass to Land—Value of Land
—Payment of \$1 into Court—Acceptance by Plaintiff.

Motion by defendant to set aside taxation of plaintiff's costs and to direct taxation on Division Court scale and set-off under Rule 1132. The action was brought in the High Court for trespass to land. The land, as shewn by affidavit, was of value exceeding \$200. The plaintiff claimed \$1,000 damages. The defendant paid \$1 into Court and the plaintiff accepted it. No question as to the title to the land was raised by defendant.

J. L. Counsell, Hamilton, for defendant.

J. Dickson, Hamilton, for plaintiff.

BRITTON, J.—The action was properly brought in the High Court. The plaintiff's right to costs is simply because under Rule 425 he is in such a case offered his costs as an inducement to this termination of the litigation. *Babcock v. Standish*, 19 P. R. 195, followed. *Chick v. Toronto Electric Light Co.*, 12 P. R. 58, and *Tobin v. McGillis*, 12 P. R. 60. referred to as difficult to distinguish and not cited in the case followed. Motion dismissed with costs.

BRITTON, J.

FEBRUARY 9TH, 1903.

CHAMBERS.

LOVELL v. PHILLIPS.

Costs—Scale of—Jurisdiction of County Court—Ascertainment of Amount—Action for Price of Goods—Reduction of Claim by Trial Judge.

Appeal by plaintiff from taxation of costs by the senior taxing officer at Toronto. The action was brought in the High Court to recover \$340, balance of an account for \$790 for logs sold by plaintiff to defendant; \$450 was paid by defendant before action. The trial Judge found that the sale was made as contended by plaintiff, but reduced the amount by \$20, by reason of some of the logs not having been received by defendant. Upon this judgment, with no certificate, the taxing officer taxed to plaintiff costs on the lower scale only and to defendant the excess of his costs over County Court costs, and set them off pro tanto.

S. B. Woods, for plaintiff, conceded that, if the finding had been for \$340, he would have been entitled only to costs on the County Court scale, but contended that, as the trial Judge reduced the amount, no matter why, the finding was for an amount not liquidated or ascertained by the signature of defendant or by act of the parties.

H. D. Gamble, for defendant, contra.

BRITTON, J., held that plaintiff's contention could not prevail. *Furnivall v. Saunders*, 26 U. C. R. 119; *Ostrom v. Benjamin*, 21 A. R. 467, and *Brown v. Hose*, 14 P. R. 3, discussed. Appeal dismissed without costs.

MEREDITH, C.J.

FEBRUARY 9TH, 1903.

CHAMBERS.

EVOY v. STAR PRINTING AND PUBLISHING CO.

Security for Costs—Libel—Newspaper—Mistake—Apology—Good Defence—Grounds of Action Trivial or Frivolous.

Appeal by plaintiff from order of Master in Chambers (ante 91) requiring plaintiff to furnish security for defend-

ants' costs of an action for libel. The writing complained of was published in defendants' newspaper.

G. P. Deacon, for plaintiff.

J. B. Holden, for defendants.

MEREDITH, C.J., dismissed the appeal, holding that a case for security for costs had been established.

BRITTON, J.

FEBRUARY 9TH, 1903.

WEEKLY COURT.

WRIGHT v. ROWAN.

Injunction—Interim Injunction—Dealing with Shares—Dissolving Injunction on Facts Appearing on Motion to Continue.

Motion by plaintiffs, the executors of J. D. Wright, to continue injunction obtained by plaintiffs ex parte, restraining defendant from dealing with certain shares forming part of the estate.

D. Henderson, for plaintiffs.

C. H. Ritchie, K.C., for defendant.

BRITTON, J., held that, upon the facts of the case as presented on the present motion, an injunction would not be granted, and so the motion failed. It was not a case where any injury would be likely to result by withholding the injunction. The defendant seemed to have been frank and willing to make full disclosure, and there was nothing in his examination that would suggest a possibility of loss to plaintiffs, if on any ground they were entitled to recover. It was no ground for continuing the injunction that it would do no harm to defendant. It might or might not. There was no such dealing with shares as entitled plaintiff to tie these shares up pending litigation. Motion dismissed and injunction dissolved. Question of costs reserved for trial Judge, or further order.

FEBRUARY 9TH, 1903.

DIVISIONAL COURT.

HAIGHT v. DANGERFIELD.

Will—Construction—Estate for Joint Lives of Devises—Remainder to Heirs of Both—Period for Ascertainment of Heirs—Mortgage by Joint Tenants for Life.

Appeal by plaintiffs from judgment of LOUNT, J. (1 O. W. R. 551), in an action tried at Hamilton without a jury.

The plaintiffs were the executors of the will of the late Samuel Haight. Among the assets of the estate was a mortgage made by Arthur Eugene Dangerfield and Richard Dangerfield, two sons of the late James Dangerfield, under whose will the two sons took their interest. The mortgage purported to convey certain lands in fee simple to the testator, James Haight, and the defendants alleged that all they took under the will of James Dangerfield was an estate for life. The action was brought by the plaintiffs for the sale of the mortgaged premises, for judgment against the mortgagors on their covenant for payment, for immediate possession, and for a declaration of the construction of the will of James Dangerfield. The trial Judge dismissed the action, except as to the mortgage, upon which he gave judgment for possession, an account, and payment. The plaintiffs appealed, seeking further relief.

J. Bicknell, K.C., and G. C. Thompson, Hamilton, for appellants.

W. H. Barnum, Dutton, for adult defendants.

F. W. Harcourt, for infant defendants.

The judgment of the Court (BOYD, C., FALCONBRIDGE, C.J.) was delivered by

BOYD, C.—By the terms of the will a point of time was fixed for the sale of the land and distribution of the proceeds of sale. That is, at the time when the life estate given to the two sons—to last as provided by the testator during the life of the longest lived of the two—has come to an end by the death of both sons. At that time the corpus of the land is to be sold and the proceeds of each share (i.e., presumably, a moiety) shall be equally divided and given unto their respective lawful heirs then surviving them, share and share alike. This plainly points to the ascertainment of the persons to share beneficially in the moneys arising from the sale at a time fixed as at (i.e., after) the decease of both the sons. The persons found to be the lawful heirs of each son are entitled to one-half the proceeds to be divided among them share and share alike. This has the effect of limiting the sons' estate to one for life or their joint lives, and to something less than an estate in fee or in tail. The nature of the estate under the mortgage will depend on the state of affairs as to family at the death of the son who first dies. But upon the death of both sons the corpus falls to be sold and divided as directed. Having regard to *Evans v. Evans*, [1892] 2 Ch. 173, the estate in the land is to be defined as a life estate for the joint lives of the two sons, the first takers

(subject to certain modifications that may arise on the death of one during the life of the survivor, which can now only be conjectural) with remainder in fee to the persons answering the description of the heirs of each son at the death of the longest lived. The ultimate destination of the proceeds of the land is not to those who are the heirs of the first deceased son at the time of his death, but those who are his heirs at the death of the son who dies second.

Judgment accordingly. All costs of plaintiffs to be paid by the defendants the mortgagors up to the hearing, and costs of those who are brought in on account of the question of construction to be borne either by themselves or by the mortgagors, as they covenanted for a title in fee simple. Costs in Master's office reserved to be disposed of by the Master on and after taking the accounts.

FEBRUARY 9TH, 1905.

DIVISIONAL COURT.

PEOPLE'S BUILDING AND LOAN ASSN. v.
STANLEY.

Mortgage—Building Society—Fraudulent Misrepresentations—Rate of Interest—R. S. O. ch. 127, secs. 4, 5, 6—Jury Notice—Power to Deprive Party of Right to Pay—Judicature Act, sec. 110—Intra Vires.

Appeal by defendant from judgment of LOUNT, J., in favour of plaintiffs for \$1,129.66 and interest and costs, in an action to recover payment of the balance due upon two mortgages for \$1,000 each. The defendant pleaded that he had been induced to execute the mortgages by fraudulent misrepresentations on the part of plaintiff's manager as to the rate of interest he was to pay. Under the terms of the mortgages defendant agreed to pay the principal with interest at sixteen per cent. per annum, subject to a provision that upon payment of the monthly subscription upon the shares on which he borrowed, and the monthly premiums which he agreed to pay for his shares, together with interest at six per cent. per annum upon the advance, the payments would be accepted in satisfaction of the advance.

W. H. Bartram, London, for appellant.

I. F. Hellmuth, K.C., for plaintiffs.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J., holding that the trial Judge properly found upon the evidence that the defence of fraud had not been

made out. (2) That the mortgages are not within secs. 4, 5, and 6 of R. S. C. ch. 127, but are framed in the manner authorized by the Building Societies Act. (3) That the Legislature of Ontario had power under sec. 14 of the B. N. A. Act to enact sec. 110 of the Judicature Act, which permits the striking out, in certain cases, of a notice for jury.

Appeal dismissed with costs.

FEBRUARY 9TH, 1903.

DIVISIONAL COURT.

REX v. HAYES.

Criminal Law—Conviction for Importing Alien Labourers into Province — Scienter — Necessity for — Conviction Bad on its Face—Amendment—Evidence as to Alienage—Person Born abroad—British Parents.

Rule nisi to quash conviction of defendant by the police magistrate for the city of Toronto for that the defendant did, at the city of Toronto and at other places, unlawfully prepay the transportation and assist and encourage the importation and immigration of Frederick DeRocher, an alien and foreigner, from the United States of America into Canada, under contract, made previous to the importation, to perform labour and service in Canada, viz., to act as a workman at the factory of the Toronto Carpet Manufacturing Company, Limited, in the city of Toronto, in the employ of the company, contrary to the statute. A fine of \$50 and costs was imposed.

G. H. Watson, K.C., for defendant, moved the rule absolute.

J. G. O'Donoghue, for prosecutor, shewed cause.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.—The offence of importing aliens under a contract to do work in this Province is a new offence created by 60 & 61 Vict. ch. 11 (D.), as amended by 1 Edw. VII. ch. 13, and it is an essential element in the offence that it shall be done “knowingly,” so that, unless done knowingly, it is no offence at all. The information does not charge defendant with having knowingly done the acts charged, nor is he convicted of having knowingly done them; and the conviction on its face is bad: *Carpenter v. Mason*, 12 A. & E. 629; *Regina v. Justices of Radnor*, 9 Dowl. P. C. 90. The omission from the information and conviction of one

of the essential elements of the offence is not either an irregularity, an informality, or insufficiency, so as to be aided by sec. 889 of the Criminal Code.

Upon a perusal of the depositions, it does not appear that defendant has "knowingly" assisted, encouraged, or solicited the importation of any alien or foreigner into Canada. It appears that Frederick DeRocher was born in the United States, but that his parents were born in Canada. There is no evidence that either he or his parents were ever naturalized in the United States. The presumption from the only facts in evidence is that his parents are British subjects, though residing in the United States, and that, therefore, he is a British subject: Dicey's Conflict of Laws, ed. of 1876, p. 178; 2 Steph. Comm., 12th ed., p. 406.

Rule absolute quashing conviction with costs to be paid by prosecutor. Usual protection to magistrate.

FEBRUARY 9TH, 1903.

DIVISIONAL COURT.

SCOTT v. BARRON.

Way—Dedication as Public Highway—Finding as to on Evidence—Private Way—Removal of Obstruction—Injunction—Mandatory Order—Attorney-General—Adding as Plaintiff—Conditional Consent.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 558), dismissing the action and awarding defendants \$25 damages under an undertaking as to damages given by plaintiff as a condition to the granting of an application for an interim injunction; and cross-appeal by defendants as to damages. The action was brought by one Scott to restrain defendants from trespassing upon an alleged private way, or, if it were a highway, from continuing an alleged nuisance upon it. The Attorney-General was added as a plaintiff at the trial. The locus was a lane leading to the plaintiff's saw-mill in the 11th concession of the township of Colchester North. The defendants set up that the lane was a public highway and that the proper use thereof was not interfered with by the building of a platform by defendants.

J. H. Rodd, Windsor, for plaintiff.

T. Langton, K.C., for defendants.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.—We concur in the finding of the Chief Justice that the lane is not a public highway, and that there has

been no dedication to the public: *Bedford v. Hynes*, 7 U. C. R. 464; *Regina v. Chorley*, 12 Q. B. 515; *Regina v. Rankin*, 16 U. C. R. 304; *Dunlop v. Township of York*, 16 Gr. 216; *Poole v. Huskisson*, 11 M. & W. 827. But we are of opinion that the plaintiff Scott, without the assistance of the Attorney-General, is entitled to restrain defendant from erecting the platform in question upon any part of the land set apart for the lane, and to a mandatory order for its removal. If a portion of the lane had become a highway by dedication, the Attorney-General, upon the relation of Scott, would have been entitled to an order for its removal as a nuisance, even although it did not constitute an actual obstruction to the public user: *Attorney-General v. Shrewsbury and Kingsland Bridge Co.*, 21 Ch. D. 752.

The Attorney-General wrote a letter to Scott's solicitors in which he expressed his willingness "that the Attorney-General should be added as a party plaintiff if at the trial the presiding Judge should be of opinion that it was necessary." This was not a fiat nor a consent justifying the addition of the Attorney-General as a plaintiff.

Appeal allowed and plaintiff Scott declared entitled to an injunction to restrain defendants from building or encroaching or in any way trespassing upon the lane, and to a mandatory order directing them within one month to remove the platform and to replace the soil of the lane in its former condition, or in default that plaintiff may do so at the expense of defendants. Reference (if necessary) to local Master at Sandwich to ascertain amount of such expense. Defendants to pay plaintiff's costs to the trial and costs of appeal. Further directions and subsequent costs reserved (in case of a reference) until after report. Cross-appeal to increase defendants' damages dismissed with costs.

FEBRUARY 9TH, 1908.

C.A.

**BREWER v. LAKE ERIE AND DETROIT RIVER
R. W. CO.**

Railway—Injury to Person Crossing Track—Negligence—Question for Jury—Liability of Company—Evidence of Operating Train on Line of other Company—Subsequent Amalgamation—Name of Amalgamated Company—Revivor—Damages for Personal Injuries—Reduction on Appeal.

Appeal by defendants from judgment of FERGUSON, J., in favour of plaintiff in an action to recover damages for injuries alleged to have been sustained by him while driving

a team south from the town of Dresden across defendants' railway, owing to the negligence of defendants. The jury found in favour of plaintiff for \$1,800 damages, and judgment was given for that sum.

M. Wilson, K.C., and J. H. Coburn, Walkerville, for appellants.

A. B. Aylesworth, K.C., and J. B. Rankin, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—Except upon the ground that the damages are excessive, there is no reason to interfere with the verdict and judgment. Whether, at the date of the accident, the Erie and Huron Railway Company and the Lake Erie and Detroit River Railway Company had become amalgamated under the powers conferred by the Dominion Act 62 & 63 Vict. ch. 67, or not, there is some evidence, oral and documentary, that the engine and train which collided with the plaintiff's team were then being operated for and were under the management and direction of the Lake Erie and Detroit River Railway Company—by the servants, in short, of that company—though over the road of the Erie and Huron Railway Company; *Fitzgerald v. Grand Trunk R. W. Co.*, 19 S. C. R. 359. There was quite enough evidence of this to shift the onus upon the defendants of proving that this was not the case and that the train was in fact being operated by and for the Erie and Huron Railway Company. The action is, therefore, seen to have been rightly brought against the Lake Erie and Detroit River Railway Company. The two companies did, in fact, during the pendency of the trial, become amalgamated by agreement, confirmed by 2 Edw. VII. ch. 69 (D.), as a new company, by the name of the company against which the action was brought, and that new company has succeeded to the rights and become subject to all the liabilities of both the amalgamated companies: 62 & 63 Vict. ch. 67, secs. 4-8. The name of the new company being the same as that of the company against which the action was brought, no amendment in the style of cause is necessary, and an order to amend or revive, though in strictness regular, would seem to be superfluous. . . .

The question of negligence was, on the evidence, entirely for the jury. The case could not properly have been withdrawn from them, and, if they believed the evidence for plaintiff, they were quite warranted in finding in his favour everything involved in that question.

The damages awarded, regarding the evidence on that point most favourably for plaintiff, were unreasonably large, even extravagant. Allowing as much as \$200 for the horses and waggon—and that, on the evidence, is a high valuation—the jury have given plaintiff \$1,600 for a broken or dislocated collar bone, two or three months' illness (not entirely interfering with his working), and the shock and pain of the accident. Beyond a trifling enlargement of the bone at the point of fracture or dislocation, no permanent trace of the accident is left. The plaintiff is a young man, and, on the medical evidence, there is no reasonable ground for supposing that within a year from the time of the accident he will not be as strong and well as he ever was. I think plaintiff should have the option of accepting a judgment for \$1,200 with costs throughout, including, of course, the costs of the first trial at which the jury disagreed. If he does so within, say, ten days, the appeal should be dismissed with costs. If he does not, there must a new trial, costs of the former trial to abide the event, and no costs of appeal to either party.

[The plaintiff elected to accept \$1,200, and the appeal was dismissed with costs.]

WINCHESTER, MASTER.

FEBRUARY 12TH, 1903.

CHAMBERS.

TRADERS BANK OF CANADA v. SLEEMAN.

Discovery—Examination of Parties—Creditors' Action under 13 Eliz. ch. 5—Fraud—Pleading—Prayer for General Relief—Alleged Transfer of Assets of Debtors—Amendment of Pleadings.

Motion by plaintiffs for an order requiring defendants George and Sarah Sleeman to attend for re-examination for discovery and to answer questions which they declined to answer upon examination, and, if necessary, for leave to amend the statement of claim. The action was brought on behalf of the plaintiffs and all other creditors of defendant George Sleeman, against the latter, his wife, his sons, and the firms of Sleeman Brothers, Sleeman & Sons, and George Sleeman's Sons, for: (1) an account of all moneys of or derived from defendant George Sleeman which have been expended for the erection, equipment, and supplying of a new brewery and business in the city of Guelph and discovery in respect thereof; (2) discovery of the assets of defendant George Sleeman at the time he became indebted to plaintiffs and subsequently, and transferred to or placed in the name of defendants, and as to the disposition of such assets; (3)

judgment setting aside a certain deed of lands, and declaring that such lands are the property of defendant George Sleeman; and that defendant Sarah Sleeman is a trustee thereof for him, and making such lands available for payment of the debts of defendant George Sleeman to plaintiffs and other creditors; (4) judgment declaring that defendant Sarah Sleeman is the trustee of or otherwise holds certain other lands for defendant George Sleeman; (5) in the alternative, judgment declaring that all buildings, machinery, equipments, and goods upon the premises used in connection with or forming part of the new brewery and brewing business, are part of the assets of the estate of defendant George Sleeman, and available for payment of his debts; (6) such further and other relief as might seem just. Upon the plaintiffs examining defendants George and Sarah Sleeman, their counsel objected to their answering any questions as to the persons forming the firms of Sleeman & Sons, George Sleeman's Sons, or Sleeman Brothers, and as to whether they had any interest in the brewery business, or whose business it was, or as to defendant George Sleeman's connection therewith, or as to the erection thereof by him, or whether any of his money went into the brewery or the building, and whether the brewery was built, completed, and fitted up with machinery and in operation or not.

W. R. Riddell, K.C., for plaintiffs, contended that the prayer for general relief entitled them to the discovery sought, citing *Watson v. Hawkins*, 24 W. R. 884; *Phillips v. Royal Niagara Hotel Co.*, 25 Gr. 358; *Slater v. Canada Central R. W. Co.*, ib. 363.

W. M. Douglas, K.C., for defendants.

THE MASTER acceded to the argument of plaintiffs, referring also to *Columbia National Bank of Lincoln v. Baldwin*, 90 N. W. Rep. 890.

On the question of plaintiffs' right to discovery, the Master referred to *Orr v. Draper*, 4 Ch. D. 92; *Brown v. Wales*, L. R. 15 Eq. 142. He held that no question can be raised as to the right of plaintiffs to maintain this action. As defendants admit that plaintiffs are creditors of defendant George Sleeman, and plaintiffs bring the action on behalf of all creditors of that defendant in order to obtain assets which they allege he fraudulently conveyed and transferred in order to defeat, hinder, and delay his creditors, it is not necessary that they should have obtained judgment against their debtor before bringing the action: *Reese River Silver Mining Co. v. Attwell*, L. R. 7 Eq. 347; *Longway v. Mitchell*, 17 Gr. 190; *McCall v. Macdonald*, 13 S. C. R. 247, 255, *Cornish v. Clark*.

L. R. 14 Eq. 184, *Ramsden v. Brearley*, 33 L. T. N. S. 322, and *Bank v. Harris*, 84 N. Car. 206, also referred to. The plaintiffs are entitled to the fullest discovery of the matters in question. The questions asked should have been answered, whether other questions relating to other matters referred to in the statement of claim should or should not be answered. It is of the utmost importance that the dealings of the parties in connection with the lands described and the buildings, machinery, etc., being erected thereon, should be fully investigated if they are to succeed in proving the allegations contained in the statement of claim. This is not an action for an account, as that term is usually understood, and therefore *Graham v. Temperance and General Life Assurance Co.*, 16 P. R. 536, is not applicable. It is the usual creditors' suit brought under 13 Eliz. ch. 5, and the fullest discovery is always allowed where fraud is charged. The discovery as to the buildings and machinery must necessarily have a bearing on the question as to the ownership of the land upon which they are being erected, and which is attacked by plaintiffs.

Order made as asked for attendance of defendants George and Sarah Sleeman for re-examination. Costs of application to plaintiffs as against these defendants in any event. Order made allowing plaintiffs to amend their statement of claim. Costs of amendment to be costs in the cause.

MEREDITH, C.J.

FEBRUARY 13TH, 1903.

CHAMBERS.

REX EX REL. WARR v. WALSH.

Municipal Elections—Hour of Nomination—Councillors Elected by Acclamation—Power of Council of Town to Pass By-law Changing Hour—Construction of Statutes.

Appeal by defendants from order of Master in Chambers (ante 108), setting aside the election of the appellants as councillors for the town of Brampton, and directing a new election upon the ground that the nomination of candidates which resulted in the election of the appellants by acclamation took place at ten o'clock in the forenoon, and not at noon.

T. J. Blain, Brampton, and D. O. Cameron, for appellants.

E. G. Graham, Brampton, for relator.

MEREDITH, C.J.—In each of the years from 1898 to 1902 (inclusive) the municipal council of the town of Brampton provided by by-law that the nomination for councillors should be held at the same time and place as the nomination for mayor, that hour being ten o'clock in the forenoon, and this

they assumed to do under sub-sec. 2 of sec. 118 of the Municipal Act, R. S. O. ch. 223. The difficulty arises in grafting the provisions of the Municipal Amendment Act, 1898, as to the election of councillors of towns having a population of not more than 5,000, upon the provisions of the Municipal Act. Sub-section (1) of the section added by the Act of 1898 (71a) had not the effect of abolishing, in the case of towns to which it applied, their division into wards; the only change made was that, instead of there being a prescribed number of councillors for each ward, the number of councillors was fixed at six, and, instead of being elected by wards, they were all to be elected by a general vote. The language of sub-sec. 2 of the added section should be treated as an inaccurate expression of the idea that, on the conditions and in the event mentioned in it, the former mode of constituting the council and of election of councillors might be restored. Sub-section 2 of sec. 118 should be read, in order to give effect to the amendment, as empowering the council, where the election is to be by general vote, to provide by by-law that the nomination of councillors shall be held at the same time and place as that for mayor, and to make the same provision in the case of all towns of over 5,000, where the nomination of councillors must still be made for the several wards of the town. And sec. 119 should be read as providing that the meeting for the nomination of councillors in either case shall, unless the contrary is provided by by-law, be held at noon. Therefore, the council had power to pass the by-law under the authority of which the nomination for councillors was held at the same time and place as the nomination for mayor, and the appellants were properly nominated and duly elected.

Appeal allowed with costs here and below.

FEBRUARY 13TH, 1903.

C.A.

HOLDEN v. TOWNSHIP OF YARMOUTH.

Railway—Negligence of Servants—Crossing—Non-repair of Road—Injury to Persons Crossing Track on Highway—Liability of Railway Company.

Appeals by defendants the corporation of the township of Yarmouth and the Michigan Central Railway Company from the judgment of FALCONBRIDGE, C.J. (1 O. W. R. 557), in favour of plaintiffs as against both defendants for \$1,600 damages and costs. The plaintiffs were driving along the Talbot Road in the township of Yarmouth, and, when crossing the railway track, their horse was frightened by the moving of cars, and they were thrown out and injured.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.

A. B. Aylesworth, K.C., for appellant township corporation.

I. F. Hellmuth, K.C., and D. W. Saunders, for appellant railway company.

W. R. Riddell, K.C., for plaintiffs.

Judgment was reserved as to the appeal of the township corporation.

Judgment was given at the close of the argument on the appeal of the railway company.

MOSS, C.J.O.—I think we are all agreed that no negligence has been shewn against the railway company. The company was doing its ordinary business in a perfectly legitimate way. In order not to obstruct public travel on the highway, the engine and cars were drawn up to the north of the highway, so as to leave an ample space for the passage of vehicles along the road, and it was a proper act on the part of the railway company to clear the highway in this manner, and then signal the plaintiffs to proceed. That signal was only an invitation in this sense, that it was notice to the plaintiffs that the road was clear, and that they would not be run into by the cars while making the crossing. There was evidence given that there was some noise just as the plaintiffs' vehicle cleared the crossing. If there was such a noise (and if it proceeded from the train) the noise was not an unusual one. I can see no evidence of negligence on the part of the company; their appeal must be allowed, and the action as against them must be dismissed with costs.

OSLER, J.A.—The plaintiffs' difficulty is that they have not come up to their pleading. Their pleading is all right—they charge that the company's servants "by negligently moving their cars so frightened the plaintiffs' horse," etc. If the evidence had borne out this allegation, and if they had proved that the defendants had negligently moved their cars, or had done something likely to frighten their horse, they would have been entitled to succeed, but they failed to prove this.

This case is not like *Stott v. Grand Trunk R. W. Co.*, 24 C. P. 347, where there was evidence of a wilful act in blowing the whistle, nor is it like *Manchester R. W. Co. v. Fullerton*, 14 C. B. N. S., where the company unnecessarily blew off steam from the mud-cocks. In both these cases there was

clearly negligence, but here the plaintiffs have failed to prove any, and as against the railway company their action must be dismissed.

MACLENNAN, J.A.—Unless we are to hold that there is a duty cast upon the railway company, under the circumstances of this case, to preserve absolute silence, there can be no liability for this accident, and I agree that the appeal of the railway company should be allowed.

GARROW and MACLAREN, JJ.A., concurred.

MACMAHON, J.

FEBRUARY 14TH, 1903.

WEEKLY COURT.

DAIGNEAU v. DAGENAIS.

Mortgage — Action for Foreclosure — Costs — Mortgagee Claiming more than Amount Due — Tender of Less than Amount Due.

Motion by plaintiff for judgment on further directions and costs after the report of the local Master at Ottawa in an action by a mortgagee of a lot in the village of St. Joseph, in the county of Carleton, for payment or foreclosure and possession. The plaintiff, at the time the action was brought, claimed \$400 as being due under the mortgage. The defendant, before action, tendered \$152, and paid that sum into Court in full satisfaction of plaintiff's claim. The report of the Master shewed that the amount due plaintiff at the date of the issue of the writ of summons was \$229.78, and the amount due at the date of the report was \$240.29.

A. E. Lussier, Ottawa, for plaintiff.

T. McVeity, Ottawa, for defendant.

MACMAHON, J., held following *Cotterell v. Stratton*, L. R. 8 Ch. at p. 302, and *Turner v. Hancock*, 20 Ch. D. 303, that plaintiff was entitled to his general costs unless he had forfeited them by some improper claim or other misconduct; and, following *Loftus v. Swift*, 2 Sch. & Lef. 642, *Gammon v. Stone*, 1 Ves. 339, *Goforth v. Bradley*, 2 Ves. Sr. 678, and *Trotter v. Maclean*, 13 Ch. D. 588, that the mere fact that the mortgagee claims more than is due is not such misconduct as will deprive him of costs, and, in the absence of a tender of the whole amount due to him, the mortgagee is entitled to his costs of suit, although he demands more than is due. Therefore plaintiff was entitled to costs.

Judgment for plaintiff with costs, in the usual form.

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MEREDITH, C.J.

FEBRUARY 14TH, 1903.

CHAMBERS.

TRADERS BANK OF CANADA v. SLEEMAN.

Discovery—Examination of Parties—Creditors' Action under 13 Eliz. ch. 5—Fraud—Pleading—Specific Attack—General Charges—Transfer of Assets of Debtor—Scope of Discovery.

Appeal by defendants from the order of the Master in Chambers (ante 127) requiring defendants George and Sarah Sleeman to attend for further examination for discovery.

W. M. Douglas, K.C., for appellants.

W. R. Riddell, K.C., for plaintiffs.

MEREDITH, C.J.—I think it is a pity that the order was not drawn up before the appeal came on to be heard, but I may as well dispose of this case now. It seems to me I can do so as well now as after further consideration.

It may be that the pleading is not well drawn; and, very minutely criticized, it is perhaps open to some of the objections which have been urged against it by Mr. Douglas; but, looking at it as one must under the modern and somewhat loose system of pleading which prevails, and looking at it fairly and not too critically, I think the case which plaintiffs present is this. They make an attack upon a transfer of the lands which are mentioned in paragraphs 8 and 13 of the statement of claim—make a specific attack upon these. They also make a specific attack upon the moneys which have been employed in erecting the brewery upon these lands. They also, in a general way, by paragraph 6, attack transfers of property which is not described officially, at all events, but the particulars of which, they say, they are unable to ascertain; and these transactions they seek to attack as fraudulent as against creditors.

Paragraphs 5 and 7 allege the insolvency of defendant George Sleeman, the debtor, long before the transactions of 1902 which are impeached in paragraphs 8 and 13. There is also the allegation that defendants have all conspired to withdraw the property of Sleeman from the reach of his creditors by transferring it in various ways, and by ultimately putting parts of it, at all events, in the properties specifically mentioned, which plaintiffs are seeking to reach.

It is not necessary to say whether plaintiffs have made, in paragraph 6, a case which would entitle them to any specific relief as to the matters that are there dealt with. I think it is unnecessary for me to determine that on this motion. Plaintiffs are entitled to full discovery as to the matters that they specifically attack, and the transfers of the lands attacked in paragraphs 8 and 13, and also the dealings with the moneys which plaintiffs allege were employed in putting up the building.

I think it is relevant, also, to the inquiry to ascertain whether dispositions were made by the debtor of his property to these defendants, and, possibly, to others than these defendants, at a time and in circumstances that would tend to throw light upon what the intent was in making a transfer or disposition which is specifically attacked.

There are many instances in which that kind of evidence is admissible. Where the intent of the party is the subject of inquiry, you may shew other acts done, under similar circumstances, and about the same time, for the purpose of shewing the intent in a particular transaction.

Now, so limited, it seems to me that plaintiffs have the right fully to interrogate all these defendants. There must be considerable latitude allowed in these fraudulent conveyance cases in the examination, but care must be taken not to permit the examination to be made use of as a cloak to cover the purpose of examining into any business other than the debtor's with which a plaintiff has no concern. It is impossible to define just what questions may be put, and it will be open to defendants upon the further examination of any of the deponents, if they think the examination is not one fairly directed or relevant to the issues, as I have mentioned, to object to answer that question, and to ask for the determination of the Court as to it.

But, as I say, there must be a good deal of latitude allowed in these examinations. At the trial, I have no doubt, even supposing the claim were confined to the attack upon the specific transactions which are impeached, the Court could not shut out any evidence that was offered of dealings by Sleeman with his property, which would tend to shew that his motive in dealing with the particular property was to

withdraw it from the reach of his creditors; and it is important to plaintiffs to shew what the result was of the withdrawal of these properties, upon the financial position of the debtor.

I think the order ought not to be drawn up generally, as apparently it was intended to draw it up; but it should be limited so as to shew that the examination must be based upon the right of plaintiffs being what I have indicated, and the limit of the right to examine being that which I have mentioned.

I think the costs of the appeal should be costs in the cause to the successful party.

MEREDITH, J.

FEBRUARY 16TH, 1903.

CHAMBERS.

RE GILBERT.

Will—Construction—Bequest to Grandchildren—Whether Including Grandsons as well as Granddaughters—Devise of Land—Bequest of Money to Improve Land—Revocation of Devise—Effect on Bequest—Bequest of Money Invested in Shares—Specific Bequest—Increased Value of Shares.

Motion by the executors of the will of Jacob Gilbert for an order under Rule 938 declaring the construction of the will and codicils as to three matters.

E. Meredith, K.C., for executors. /

T. G. Meredith, K.C., for Absolom Gilbert.

T. W. Crothers, St. Thomas, for Harman Crouse.

C. F. Maxwell, St. Thomas, for Hannah Thompson, formerly Crouse.

J. Farley, K.C., for Ernest Gilbert.

MEREDITH, J.—“I charge the devises and bequests to Absolom with the payment of \$1,000 to be paid to each of my grandchildren, daughters of the said Hannah Crouse, such sums to be paid to each of them when he or she becomes of age or marries, whichever event shall first happen.” These words, notwithstanding the use of “he or she” do not include a son of Hannah Crouse. Daniel’s Settlement Trusts, 1 Ch. D. 175, distinguished.

“Also pay to my grandson, the said Harman Crouse, \$500. which is to be paid by my said son Absolom to my said executors, and which shall be employed by them in giving him a start when he shall begin farming by putting up a house on the premises hereinbefore devised to him and making

such improvements thereon out of the surplus as they may think he requires." By a codicil the testator revoked the devise referred to in these words, by giving the lands to that grandson's mother, instead of to him, but the testator did not otherwise indicate any intention to recall, annul, or transfer the gift of \$500. The legacy does not fall with the devise. *Lockhart v. Hardy*, 9 Beav. 379, referred to.

"I give to my daughter Hannah . . . the sum of \$4,000 . . . being that amount of stock in the South Western Farmers and Mechanics' Loan and Savings Society as her own property absolutely." At the time of the making of the will and of the testator's death he owned 120 shares of the capital stock of the society, of the par value of \$50 each, in all \$6,000, but which were and are saleable at a premium. By the same codicil in which this bequest was made the testator gave to his grandson Ernest \$2,000 stock in the same society. The words are sufficient to indicate that the legatee was to take four-sixths of the testator's shares in the capital stock of the society. *Broadbent v. Barrow*, 20 Ch. D. 676, 8 App. Cas. 812, referred to.

Order accordingly. Costs of all parties out of the estate; those of the executors as between solicitor and client.

BRITTON, J.

FEBRUARY 16TH, 1903.

TRIAL.

HUTCHINSON v. McCURRY.

Costs—Action for, by Attorneys—Costs Incurred in Quebec Court—Distraction in Favour of Attorneys—Rights against Unsuccessful Party—Interest.

Action by attorneys in the Province of Quebec, who acted as attorneys for one W. G. Reed in an action brought against Reed by the present defendant, to recover the taxed costs of that action. The point raised was one entirely novel in this Province, viz., the right of attorneys of the Province of Quebec to bring an action, in their own name, without the intervention of their own client, who was successful in the action there, against the unsuccessful party for the taxed costs of the action.

W. E. Middleton and W. R. Cavell, for plaintiffs.

C. E. Hewson, K.C., for defendants.

BRITTON, J.—To entitle plaintiffs to succeed in this action they must have, either in form or by operation of law, a judgment in their own favour in the Province of Quebec. Section 553 of the Code of Civil Procedure of the Province of

Quebec provides that "every condemnation to costs involves, by operation of law, distraction in favour of the attorney of the party to whom they were awarded." "Distraction of costs" was proved to mean "the diverting of costs from the client or party who would in the ordinary course be entitled to them, and their ascription to his attorney or other person equitably entitled." The plaintiffs are entitled to judgment for the amount taxed, \$238.20. These costs would carry interest in Quebec, but in this case there is no claim for interest, and no evidence of any demand in Ontario before action.

Judgment for plaintiffs for \$238.20 with costs.

FALCONBRIDGE, C.J.

FEBRUARY 16TH, 1903.

TRIAL.

PAGE v. GREEN.

Building Contract — Damages for Delay — Both Parties Guilty of Delay—Account.

Action by Bessie Page, of Toronto, trading under the name of Page & Co., against John M. Green, of St. Thomas, trading under the name of J. M. Green & Co., to recover \$2,559.67 for work done upon the new armoury buildings at St. Thomas under a sub-contract, and for \$1,000 damages for breaches of contract by defendant. The defendant also counterclaimed for damages for breach of the contract.

W. Laidlaw, K.C., for plaintiff.

J. A. Robinson, St. Thomas, for defendant.

FALCONBRIDGE, C.J., found that each party had been guilty of such delay in performing his own part of the contract as to disentitle him to claim damages from the other on this ground. After going through the items of the accounts between the parties, the Chief Justice found \$1,114.08 due to plaintiff. Judgment for this sum with costs.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

CENTRAL CANADA LOAN AND SAVINGS CO. v.
PORTER.

Title to Land—Registered Title—Real Property Limitation Act.

Appeal by defendant from judgment of ROBERTSON, J. (1 O. W. R. 482), in favour of plaintiffs in an action of ejectment tried at Peterborough. The trial Judge found as a

fact that defendant's title by possession never matured so as to displace the paper title of plaintiffs.

E. B. Stone, Peterborough, for appellant.

D. W. Dumble, K.C., for plaintiffs.

THE COURT (STREET, J., BRITTON, J.) held that, upon a perusal of the evidence and exhibits, there seemed no reason for disturbing the result arrived at by the trial Judge, the whole question being one of fact, the onus being on defendant, and he having, in the opinion of the trial Judge and of the Court, failed to satisfy the onus. The plaintiffs were purchasers for value with a registered title and without notice of the paper title of defendant, which was not registered till after this action was brought. Plaintiffs' paper title must, therefore, prevail also. Appeal dismissed with costs.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

ONTARIO ELECTRIC LIGHT AND POWER CO. v.
BAXTER AND GALLOWAY CO.

Contract—Supply of Electric Current—Destruction of Building on Premises to which Current to be Supplied—Impossibility of Performance—Defence to Action for Price—Readiness and Willingness to Perform—Damages for Breach.

Appeal by defendants from judgment of County Court of Wentworth in favour of plaintiffs in action tried without a jury. The plaintiffs' claim was upon a written agreement for the supply of an "electric current to the extent of fifty horse-power," to recover three instalments (less \$85.39 paid on account) alleged to be due by defendants under a provision in the agreement whereby defendants "agree to pay for the electric current . . . \$1,250 per annum . . . in equal monthly payments," for five years. The defence was that the agreement, according to its true construction, was for the supply of electric current for a particular specified mill, and that the mill having been destroyed by fire on the 25th April, 1901, without default, and before any breach of the agreement on the part of defendants, performance of the agreement had become impossible, and the parties were excused. The agreement of plaintiffs for the supply of the current was that they would, "upon the conditions and for the purposes and within the limits" stated in the agreement, supply it for and to defendants "in the premises" of defendants. The second paragraph was: "It is understood and agreed that the said electric current so to be supplied shall

be used by the customers for the purpose of operating their machinery and for the purpose of obtaining power for use in their business as millers, and for no other purpose.

J. V. Teetzel, K.C., for defendants.

G. Lynch-Staunton, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J.) held that the object of the provision in the second paragraph was to guard against the current being used for any other than power purposes, and there was nothing to prevent the customers using the current for these purposes in any place to which they might choose to transmit it, and nothing to confine the use of it by the customers to any existing mill on the premises. Therefore, the performance of the agreement, has not become impossible, and the rule in *Taylor v. Caldwell*, 3 B & S. 826, was inapplicable. But the plaintiffs were not entitled to recover the monthly payments claimed. The current was not supplied after 25th April, 1901, it having been on that day cut off, if not by plaintiffs, at least with their consent. Readiness to supply the current is not enough to entitle them to recover. The plaintiffs are entitled to damages for the refusal of defendants to perform their contract, but that is not the form of the action, and there is no evidence upon which the damages can be assessed.

Appeal allowed and judgment reversed without costs, and new trial directed, with leave to plaintiffs to amend. Costs of the former trial to be costs in the cause unless the trial Judge otherwise directs.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

HOGG v. TOWNSHIP OF BROOKE.

Way—Non-repair—Injury to Person — Accumulation of Snow—Responsibility of Township Corporation.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 568) dismissing action to recover damages for injuries sustained by plaintiff by reason of the alleged negligence of defendants in permitting an accumulation of snow to remain on part of number 9 side road in the 3rd concession of the township of Brooke, in front of one Pellow's farm, by reason of which, it was alleged, the highway became out of repair and unsafe for travel, and owing to the bad and dangerous state of the highway the horses drawing a waggon in which plaintiff was travelling became imbedded in the snow, and were unable to proceed, and plaintiff

in assisting the horses to get out of the snow-drift was stepped upon and thrown down and his knee seriously injured.

T. G. Meredith, K.C., for plaintiff.

G. F. Shepley, K.C., for defendants.

MEREDITH, C.J.—It is unnecessary to determine whether or not defendants would have been chargeable with actionable negligence for not removing the snow from the highway so as to make the usually travelled part of it fit for travel. Not only did defendants fail to remove the snow from the travelled part of the highway, but, having in effect provided and invited the public to use as a substitute for it a way on the side of the road which they knew would become dangerous to those using it for the purpose of driving over with wheeled vehicles, as soon as a thaw set in, permitted it to remain for three days in a condition dangerous to persons so travelling, a thaw having set in making it dangerous for three days before the accident to plaintiff. In these circumstances, it was the duty of defendants to have made the highway reasonably fit for travel either upon the usually travelled part of it or upon the substituted way, which could have been accomplished at a trifling expense, or, failing that, have stopped the use of the road or given warning against the danger to those travelling upon it, and in omitting to do this they made default in keeping the highway in repair within the meaning of sec. 606 of the Municipal Act and are answerable to plaintiff in damages.

MACMAHON, J., gave a written opinion reviewing the facts and coming to the same conclusion. He referred to *Boswell v. Yarmouth*, 4 A. R. 353; *Savage v. Bangor*, 40 Me. 176; *Stickney v. Maidstone*, 30 Vt. 738; *Page v. Buckport*, 64 Me. 51; *McKelvin v. London*, 22 O. R. 70; and *LaDuke v. Exeter*, 97 Mich. 450.

Appeal allowed with costs, and judgment to be entered for plaintiff for \$600 and costs of action.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

GREAR v. MAYHEW.

Vendor and Purchaser — Action for Purchase Money — Evidence — Trespass to Goods.

Appeal by plaintiff from judgment of **FALCONBRIDGE, C.J.** (1 O. W. R. 529), dismissing without costs an action to recover \$400, the price of certain land which, as plaintiff

alleged, she agreed to sell to defendant, and of which defendant obtained a conveyance without payment of the purchase money, and also for damages for forcible ejection from her land, and injury done to plaintiff's furniture. The plaintiff alleged that the deed of the land was obtained fraudulently from her by the defendant, and that he refused to pay the purchase money, and subsequently entered on her lands, forcibly ejected her, and placed her goods in a barn, thereby doing injury to them.

John MacGregor, for plaintiff.

No one appeared for defendant.

THE COURT (MEREDITH, C.J., STREET, J.) dismissed the appeal with costs.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

ELLIOTT v. HAMILTON.

Execution—Sale of Land under—Assignment for Benefit of Creditors—Priorities—Costs.

Appeal by the defendant from the judgment of BRITTON, J. (4 O. L. R. 585, 1 O. W. R. 705) in favour of plaintiff in an action for a declaration that plaintiff was entitled to the possession of certain lands in the township of Darlington and for possession. The plaintiff purchased the land at a sale under execution. There was a question as to priority between the execution and an assignment by the defendant for the benefit of the creditors.

The defendant entered an appeal, which came on for hearing in due course, but no one appeared to support it.

D. B. Simpson, K.C., for plaintiff.

THE COURT (MEREDITH, C.J., STREET, J.) dismissed the appeal with costs.

MEREDITH, C.J.

FEBRUARY 17TH, 1903.

CHAMBERS.

RE PINKNEY.

Parent and Child—Custody of Infant—Petition of Parents—Dismissal—Special Circumstances—Direction for Sealing up of Papers.

Petition by Thomas Pinkney and Emily Jane Pinkney, the father and mother of Leland Pinkney, an infant, for an

order directing the return of the infant to the custody and control of the petitioners by William Corbett and his wife.

W. E. Middleton, for petitioners.

Shirley Denison, for William Corbett and wife.

P. H. Drayton, for the infant.

MEREDITH, C.J., held that, under all the circumstances of the case, and in view of a report of the official guardian, the petition should be dismissed with costs. The affidavits and papers, including the exhibits, must, after the time for appealing from this order has expired, if an appeal is not taken, be sealed up and remain sealed, and be indorsed with a memorandum that they are not to be opened unless by order of the Court or a Judge.

BRITTON, J.

FEBRUARY 17TH, 1903.

TRIAL.

FLETT v. COULTER.

Negligence—Injury to Infant from Kick of Horse—Horse Getting out of Pasture—Reasonable Result—Contributory Negligence of Infant—Nonsuit—Answers of Jury.

Action by Hugh Flett, an infant, and his father, for damages for injuries received by the boy on 12th May, 1902, by the kick of a horse owned by defendant. Certain questions were submitted to the jury, but the Judge reserved for consideration a motion for a nonsuit.

J. G. O'Donoghue, for plaintiffs.

S. B. Woods, for defendant.

BRITTON, J., held that, apart from the question of contributory negligence on the part of the boy, the plaintiffs were not entitled to recover. The horse was a quiet one; there was not a particle of evidence to shew that defendant knew of the horse being accustomed to stray or that he had any vicious propensities; nor was the horse shewn to have had any such fault. Even if the horse got out of the pasture by reason of defective fences, what occurred is not the reasonable result of the horse getting upon the highway. *Patterson v. Fanning*, 2 O. L. R. 462, distinguished. In this case the negligence, if any is proved, is not connected with the damage complained of. The boy fully understood what he was doing and the danger of interfering with the horse. The case was, upon the facts, altogether outside of the cases in which contributory negligence cannot be imputed by reason of tender age. Upon the evidence and upon the answer

of the jury as to the question in reference to contributory negligence, action dismissed with costs.

FALCONBRIDGE, C.J.

FEBRUARY 17TH, 1903.

TRIAL.

HARRINGTON v. SPRING CREEK CHEESE MFG. CO.

Water and Watercourses—Right to Flow of Water—Artificial Waterway—Prescription—Interruption—Defence—Amendment.

Action for a declaration that defendants have not acquired and do not possess as against plaintiff any right to the continued flow of water through an artificial waterway in the township of East Zorra, and that plaintiff is entitled to have it removed from his lands, and to have the waters flowing to his lands from a certain spring flow in their natural channel, and for an injunction and damages and other relief.

A. B. Aylesworth, K.C., and W. T. McMullen, Woodstock, for plaintiff.

E. D. Armour, K. C., and G. F. Mahon, Woodstock. for defendants.

FALCONBRIDGE, C.J., held that the merits were with defendants, who with their predecessors had enjoyed the rights now impugned for over 30 years, and, as they supposed, by express grant since 1878. There had been no interruption in the exercise of their supposed rights since their factory was built, about 1870, although plaintiff began complaining in 1895. Defendants should be allowed to amend the 6th paragraph of the defence, and defence as amended held to be established by the evidence and good in law. Action dismissed with costs.

BRITTON, J.

FEBRUARY 18TH, 1903.

CHAMBERS.

CAVANAGH v. CASSIDY.

Security for Costs—Residence of Plaintiff—Ordinary Residence Out of the Jurisdiction—Temporary Residence in Ontario.

Appeal by plaintiff from order of Master in Chambers (ante 27) requiring plaintiff to give security for costs, on the ground that he is ordinarily resident out of the jurisdiction of the High Court of Justice for Ontario, and only temporarily resident within it.

S. B. Woods, for plaintiff.

J. E. Cook, for defendants.

BRITTON, J., held, following *Allcroft v. Morrison*, 19 P. R. 59, and *Michiels v. Empire Palace, Limited*, 66 L. T. 132, that plaintiff's residence in Ontario, as shewn by the material, is not merely temporary—is certainly not for the purpose of bringing an action—and there is no reason to apprehend that he will not be here when wanted. There is no doubt that plaintiff up to September last was not only ordinarily, but altogether, since childhood, resident out of Ontario. But, upon the affidavit and cross-examination of plaintiff, he does not come within the class intended by Rule 1198 (b) as those "temporarily resident within Ontario." Plaintiff came to Toronto in September, 1902, under special employment, and for what might fairly be called a temporary purpose. His relations with his then employers are changed. He is in Ontario, resident here, with no home or employment or business connection or property of any kind out of Ontario. He is an unmarried man and has no one depending upon him. Since coming here to reside, the present alleged cause of action arose in Ontario. That he would be willing to accept a good situation and return to the United States, if opportunity offered, is not material. Appeal allowed and order for security set aside, without prejudice to any application for security, if, pending the action, plaintiff goes to reside out of Ontario. Costs in cause to plaintiff.

MEREDITH, J.

FEBRUARY 18TH, 1903.

CHAMBERS.

CAMPBELL v. SCOTT.

Discovery—Examination of Defendants—One Defendant Withdrawing after being Sworn—Order to Appear Again—Excuse.

Appeal by defendant MacTavish from order of local Judge at Stratford requiring appellant to appear for examination for discovery at his own expense.

J. P. Mabee, K.C., for appellant.

J. H. Moss, for plaintiff.

MEREDITH, J.—The one excuse offered for appellant's failure to attend and submit to examination was that he was subpoenaed to attend at 10.30 a.m. and was not called for examination until about 2.30 p.m. The four defendants were to be examined for discovery on the same day. They were all subpoenaed to attend at 10.30 a.m., and did attend, and soon after all four were sworn by the examiner, and three of them excluded while the fourth was being examined. No objection was made, no inconvenience suggested, no request for any different mode of procedure made. Between

two and three o'clock in the afternoon, two of the defendants having been examined, the third being under examination, and the fourth, this defendant, still waiting to be examined, objection was made by counsel for defendants to the presence of one Peter Campbell at the examination, and, the examiner refusing to exclude him, counsel for defendants refused to proceed, and he and the defendant under examination left the room, and being joined by this defendant, all left the Court house. Under these circumstances, the defendant MacTavish was properly ordered to attend for examination at his own expense.

Appeal dismissed with costs.

WINCHESTER, MASTER.

FEBRUARY 19TH, 1903.

CHAMBERS.

LIDDIARD v. TORONTO R. W. CO.

Parties—Joinder of Plaintiffs—Distinct Causes of Action—Injuries Received in Same Collision—Adding Plaintiff.

Motion by plaintiff to add his infant son as a co-plaintiff. The action was brought for damages for personal injury to plaintiff and for injury to his horse and waggon by the negligence of the servants of defendants in running an electric car into and colliding with plaintiff and his horse and waggon. The plaintiff's son was with his father on the waggon, and it was said that he received serious injury.

J. E. Cook, for plaintiff.

J. W. Bain, for defendants, contended that the son had a distinct cause of action, if any.

THE MASTER.—Rule 206 is to be read in connection with Rule 185: *Edwards v. Lowther*, 24 W. R. 434; *Smith v. Haseltine*, W. N. 1875, p. 250; *Long v. Crossley*, 13 Ch. D. 388. The facts stated shew that the right to the relief claimed arose out of the same transaction or occurrence, and that there is a common question of fact or law, and the case is within Rule 185: *Stroud v. Lawson*, [1898] 2 Q. B. 44; *Universities of Oxford and Cambridge v. Gill*, [1899] 1 Ch. 55; *Walters v. Green*, [1899] 2 Ch. 696. Order made as asked upon filing the consent of the proposed plaintiff and his father as next friend. Costs of application and amendment to defendants in any event.

MACMAHON, J.

FEBRUARY 19TH, 1903.

TRIAL.

HENEY v. OTTAWA TRUST AND DEPOSIT CO.

Mortgage—Action to Enforce—Defence—Collateral Security—Acceptance of Other Security—Reservation of Rights—Intention.

Action by executors of will of John Heney against the administrators of the estate of John Stewart and his widow and children, upon mortgages of lands in the city of Ottawa made by John Stewart, for immediate possession and foreclosure or sale. There was no dispute as to the right of plaintiffs to recover in respect of the balance due upon one of the mortgages, that made in 1878 to the North British Canadian Investment Company and assigned to John Heney. The defence as to the other mortgage, made in 1892 to John Heney, was that it was given as collateral security for a loan represented by a promissory note for \$16,000 made by Archibald Stewart and indorsed by Catharine and John Stewart, and that, after the last renewal of that note went to protest on 12th January, 1894, the amount thereof was included in a note for \$39,760.53, at three months, made by Archibald Stewart and indorsed by Catharine Stewart, and thereby John Stewart's estate was discharged from any liability on the mortgage. The question was whether the creditor's remedy was intended to be reserved.

J. Christie, Ottawa, and W. Greene, Ottawa, for plaintiffs.

G. F. Henderson, Ottawa, and A. E. Fripp, Ottawa, for adult defendants.

C. J. R. Bethune, Ottawa, for the official guardian.

MACMAHON, J., referred to Wyke v. Rogers, 1 DeG. M. & G. 408; Owen v. Homan, 4 H. L. C. 997; Muir v. Crawford, L. R. 2 Sc. App. at p. 457; Gorman v. Dixon, 26 S. C. R. 87; and said that the question was as to the intention of the parties, to be gathered from the terms of the agreement, having regard to the position of the parties at the time; and the fair inference to be drawn in this case was that the rights of Heney against the estate of John Stewart on the mortgage were intended to be reserved. Judgment for plaintiffs as prayed with costs. Reference to Master at Ottawa.

FEBRUARY 19TH, 1903.

DIVISIONAL COURT.

RANDALL v. OTTAWA ELECTRIC CO.

Negligence—Injury to Linesman of Electric Company—Negligence of Strangers—Duty Owed by—Precautions against Danger—Findings of Jury.

Motion by defendants Ahearn & Soper (Limited) for judgment dismissing the action, and motion by plaintiff

for judgment in his favour on the findings of the jury, in an action by a linesman in the employment of defendants the Ottawa Electric Company to recover damages for injuries sustained in the course of his employment by the alleged negligence of defendants. The trial Judge nonsuited plaintiff as against defendants the Ottawa Electric Company, but as against Ahearn & Soper left three questions to the jury, in answer to two of which they found that negligence of Ahearn & Soper was the proximate cause of plaintiff's injury, and that the negligence consisted in using uncovered wires and careless construction of tie-wires. They did not answer the third question, which was, whether the plaintiff might, by the exercise of ordinary care, have avoided the injury. The trial Judge treated what occurred as a disagreement of the jury and discharged them.

W. Nesbitt, K.C., and C. Murphy, Ottawa, for defendants Ahearn & Soper.

H. M. Mowat, K.C., for plaintiff.

THE COURT (MEREDITH, C.J., MACMAHON, J.) held that the standard for measuring the duty which Ahearn & Soper owed to plaintiff was not the same standard as that which would have been applicable if the line the current from which, as it was alleged, caused the injury to plaintiff, had belonged to his employers, and the action had been against the employers; but the duty which was owed by Ahearn & Soper to plaintiff was to take reasonable care that he should not suffer injury from the dangerous current of electricity which they were conducting on their line in close proximity to the place where he was working: *Thrussell v. Handyside*, 20 Q. B. D. 359; *Carr v. Manchester Electric Co.*, 7 Am. Electrical Cas. 746. It was for the jury to say whether there was "absence of care according to the circumstances," having regard, on the one hand, to the highly dangerous character of the element which Ahearn & Soper were dealing with, and the means that were open to them of avoiding altogether or reducing to a minimum the danger, and, on the other hand, to the obvious and ordinary means of protection and of avoiding injury that were available to plaintiff in the circumstances. The circumstance that bare wires were used for tie wires, which was apparent to the eye, and the circumstance that plaintiff was not wearing gloves when he was engaged in the work, were not sufficient to justify the withdrawal of the case from the jury: *Paine v. Electric Co.*, 7 Am. Electrical Cas. 651.

Both motions dismissed, and case to go down for a new trial. Costs of both motions and of the last trial to be costs in the cause, unless the trial Judge otherwise orders.

FEBRUARY 19TH, 1903.

DIVISIONAL COURT.

LANZ v. McALLISTER.

Patent for Invention — Infringement — Apple Syrup — Novelty — Burden of Proof.

Appeal by plaintiff from judgment of MACMAHON, J. (1 O. W. R. 455) dismissing the action, which was brought to restrain the defendant from infringing plaintiff's patented process for manufacturing apple syrup.

A. B. Aylesworth, K.C., for plaintiff.

E. P. Clement, K.C., for defendant.

THE COURT (MEREDITH, C.J., STREET, J.) dismissed the appeal with costs.

BRITTON, J.

FEBRUARY 20TH, 1903.

CHAMBERS.

BEDDELL v. RYCKMAN.

Discovery — Examination of Party — Action by Shareholder against Directors of Company for Discovery and Account — Fraud — Scope of Examination.

Appeal by defendant Cox from order of Master in Chambers (ante 86) directing the appellant to attend for re-examination for discovery and to answer certain questions.

W. H. Blake, K.C., for appellant.

W. R. Riddell, K.C., for plaintiff.

BRITTON, J., held that, unless an order should be made under Rule 472 for the determination of some issue or question in dispute before deciding upon the right to discovery, the order of the Master ought not to be interfered with. It would be difficult to select any one issue or question. It is true, the plaintiff's action is in part for discovery. And now, before there is any trial of the action, by this examination plaintiff is about to get a part, at least, of what he asks. This is somewhat anomalous; but the plaintiff says he requires the information for the purposes of the trial; that it may be most important in determining the issues. While the question whether the defendants, or any of them, were trustees or not does not depend upon the amount paid by any of them to the different companies, or upon what, if anything, defendant Cox got for underwriting any of the preference shares, or what the Canada Cycle and Motor Company paid, it cannot be said, in view of the whole statement of claim, that defendant Cox ought not to answer. These answers may, in

the event of plaintiff being entitled to recover at all, assist in the determination at the one trial, just to what extent and against whom recovery may be had. *Evans v. Jaffray*, 3 O. L. R. 327, distinguished.

Appeal dismissed. Costs to plaintiff in the cause.

BOYD, C.

FEBRUARY 20TH, 1903.

TRIAL.

FAWKES v. ATTORNEY-GENERAL FOR ONTARIO.

Land Titles Act—Claim on Assurance Fund—Transfer Procured by Fraud—Subsequent Fraudulent Transfers—Forgery—Bona Fide Purchaser for Value without Notice—Deprivation of Land—Disposition of Land.

Action by Drusilla Fawkes to recover \$10,000 from the assurance fund created under the Land Titles Act. The action was brought under a direction of the Master of Titles at Toronto, a claim having been made in his office. The land in question had been brought under the provisions of the Act prior to 1893. In April, 1893, the plaintiff transferred the land to one Dakin for value, represented by certain stock. The transfer was duly registered. In May there was duly registered a transfer purporting to be made by Dakin to one William McDonald. This transfer was not signed by Dakin, whose name apparently signed was forged. Later in May there was registered a transfer purporting to be signed by McDonald to one James D. Mulvena, and at the end of May Mulvena made a transfer to Catherine E. Brisley, which was registered, and in September Brisley made a transfer for value to Levi J. Clark, which was duly registered. The stock taken by plaintiff was of no value, and the transaction was altogether such a fraud as would be set aside by the Court as against Dakin and the string of transferees down to Clark, but Clark's position was impregnable as a registered purchaser for value without notice. The real wrongdoers throughout were two men, Griffin and Hawkesworth, who were convicted of this fraud, and were at the time of the trial inmates of the Penitentiary. These men were the chief actors, who deceived the plaintiff, put forward Dakin, forged his name, put forward McDonald, whose real name was McConnell, as a transferee (he had since died) and also put forward their clerk, one Mulvaney, after Italianizing his name, and the person called Brisley, who was the wife of Griffin, as ostensible transferees, and who negotiated the exchange of properties with Clark, the one bona fide per-

son. All the deceivers were financially worthless. The plaintiff sought compensation out of the fund.

N. W. Rowell, K.C., and Casey Wood, for plaintiff.

R. C. Clute, K.C., and McGregor Young, for defendant.

BOYD, C.—It was argued that the case was, in terms, within the scope of the Act, because plaintiff has been “deprived of her land by reason of some one else being registered as owner.” (Review of the provisions of the Act) . . . It cannot be said that plaintiff suffered wrongful deprivation of the land when she made the transfer to Dakin, for that was a real transaction, and the intention was to transfer the estate and property in the land. That transaction was voidable when plaintiff discovered the imposition practised upon her, but at the time of that discovery the rights of the bona fide transferee had intervened. Clark’s being registered as owner did not deprive plaintiff of the land; it may have prevented her recovering the land; she had ceased to be owner under the Act when her transfer was registered to Dakin, and the land was transferred in due course to Clark. Under the Registry Act, R. S. O. ch. 136, the forged deed would form an incurable defect, and the status of Clark as bona fide purchaser for value would not avail him: *Re Cooper*, 20 Ch. D. 611. But under the Land Titles Act this defect would seem to be cured in the hands of an honest holder for value: *Gibbs v. Merner*, [1891] A. C. 249. The plaintiff has no claim on the ground of the land being brought under the Act, for these words refer to the initial proceeding by which the particular land is brought under the provisions of the Act. Neither is there any claim under the provisions as to error in the certificate or entry on the record. There remains but the claim that she has been wrongfully deprived by reason of some other person being registered as owner. The word “deprivation” is used in contradistinction to another word used in the Act—“disposition.” The plaintiff’s dealing with the land falls under sec. 124. She made a transfer which was a “disposition” of the land that, if properly attacked, would be declared fraudulent and void. Her act was a “disposition” of the land, a voluntary thing, and it is not to be called a “deprivation” of it. *Attorney-General v. Metropolitan R. W. Co.*, 21 Q. B. D. 461, and *Attorney-General v. Sibthorpe*, 3 H. & N. 453, referred to.

Action dismissed. Costs of the defendant to be paid out of the fund.

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No. 8

BOYD, C.

FEBRUARY 21ST, 1903.

TRIAL.

HIGHWAY ADVERTISING CO. OF CANADA v. ELLIS.

*Company—Promoters—Sale of Patent for Invention to Company—
Prior Agreement for Acquisition.*

Action to recover \$5,000 from the promoters and directors of the plaintiff company upon the ground that that sum was diverted from the assets of the plaintiff company, and to recover another sum of \$300.

A. B. Aylesworth, K.C., and J. M. McEvoy, London, for plaintiffs.

G. F. Shepley, K.C., and J. Heighington, for defendants.

BOYD, C.—The success of plaintiff's case must rest on adequate proof being made of the allegation that defendants, as promoters of the company, obtained a half interest in the patent of invention operated by the company for the sole purpose and with the intention that such interest in the patent should be transferred to the company at a profit, upon its incorporation. The patent was disposed of by the proprietors and taken by the company at a valuation of \$50,000, of which \$5,000 was to be paid, and was paid in cash, out of the company's money. There is no contradiction of defendant Ellis's version of the matter, and it rests on his recollection and accuracy. It cannot be said that there was not a prior agreement for the acquisition of the patent by these men (now defendants) before the scheme of having a joint stock company was broached. Plaintiffs have failed to make good the essential allegation, and cannot recover on any other ground: *Burland v. Earle*, [1902] A. C. 99; *Re Lady Forest Mine*, [1901] 1 Ch. 589. The \$300 claim fails on the evidence supported by the conduct of the parties. Action dismissed with costs.

BRITTON, J.

FEBRUARY 23RD, 1903.

WEEKLY COURT.

RE DENISON, REX v. CASE.

Mandamus—Police Magistrate—Sentence for Criminal Offence—Personation of Voter — Referendum — Judicial Discretion—Right of Appeal.

Motion by E. J. Ritchie (prosecutor) for a mandamus to compel the police magistrate for the city of Toronto to impose upon Adam S. Case the sentence prescribed by sec. 167 of the Ontario Election Act. On 4th December, 1902, Ritchie was deputy returning officer at polling sub-division No. 45 in ward 6 of the riding of West Toronto, in connection with the Referendum vote, that is to say, the vote taken on the Ontario Liquor Act, 1902. Adam S. Case appeared at that poll and told the poll clerk his name was James Brophy of 143 Dowling Avenue, Toronto. Case refused to take the oath, and was arrested on the warrant of the deputy returning officer for personation. On the 26th December Case was convicted by the police magistrate and fined \$50 and costs or six months in gaol at hard labour. The prosecutor's contention was that the magistrate should have imposed the penalty of \$400 and imprisonment for one year. There was no suggestion of bad faith or improper motive on the part of the magistrate.

A. Mills and W. E. Raney, for the prosecutor.

J. Haverson, K.C., and T. C. Robinette, K.C., for defendant.

J. W. Curry, K.C., for the magistrate.

BRITTON, J., held that if the magistrate had any discretion as to the sentence, it was a judicial discretion, and mandamus should not be granted. Passing sentence by the Court upon an offender properly convicted is judicial, even where there is only a definite and particular penalty prescribed. *Short on Informations*, pp. 250, 263. *Regina v. Eastern Counties R. W. Co.*, 10 A. & E. 547. *Rex v. Hewes*, 3 A. & E. 731. *High on Extraordinary Legal Remedies*, 3rd ed., sec. 149. *Regina v. Justices of Middlesex*, 9 A. & E. 540, referred to. This is virtually an appeal. The magistrate has not asked for the opinion of the Court; the Crown is not moving in the matter; the accused is not asking to quash the conviction. *Whitchoud v. The Queen*, 7 Q. B. 532, distinguished. It need not occasion surprise if the police magistrate found some deficiency in dealing with the law. He considered the

case, and in passing sentence acted upon the law as he understood it. If the penalty were changed, the defendant might be deprived of his right of appeal to the Sessions. He might desire to appeal from a sentence to pay \$400 and be imprisoned, and there is no power on this application to extend the time for appealing.

Motion refused without costs.

MACMAHON, J.

FEBRUARY 23RD, 1903.

TRIAL.

RUPERT v. SISLEY.

Nuisance—Construction of Artificial Ponds—Injury to Neighbour's Property—Evidence of Damage.

Action by Rachael Rupert and Lucinda McQuarrie against Euston Sisley, a physician practising in the village of Maple, who owned lands adjoining the lands of the plaintiffs in that village, for an injunction and damages in respect of injury to plaintiffs' property by the construction of ponds and dams for fish on his premises, which ponds the plaintiffs alleged were a nuisance.

W. Proudfoot, K.C., and W. A. Skeans, for plaintiffs.

E. F. B. Johnston, K.C., and W. Cook, for defendant.

MACMAHON, J., held as to the claim for damages in regard to the allexed noxious smell from the ponds, and the noises said to be caused by bull-frogs, that defendant was not liable, the grievances not being, on the evidence, well founded. As to the claim for dampness in plaintiffs' cellar alleged to be caused by the percolation of water from defendant's ponds, it was also not well founded, the dampness being attributable to the character of the soil. As to the sinking of a floor in plaintiffs' house, it was not caused by dampness arising from the ponds, but was attributable to the decay of the supports. All the other claims failed also. Action dismissed with costs.

WINCHESTER, MASTER.

FEBRUARY 24TH, 1903.

CHAMBERS.

MARTIN v. MOODY.

Particulars—Motion for—Affidavit—Notice of Reading—Omission of Statement of Date of Filing—Sufficiency of Notice—Particulars of Defence—Contract—Interest—Offers.

Motion by plaintiffs for particulars of paragraphs 2, 3, 4, and 5 of the statement of defence. On 3rd February plain-

tiffs moved to strike out the statement of defence on the ground that paragraphs 2, 3, 4, and 5 were of such a loose and vague character that plaintiffs could not proceed with the trial without a further and better statement of the nature of the defence, etc. In support of that application an affidavit of one of the plaintiffs was duly filed and read. That application was refused. In the notice of the present motion it was stated that the affidavit filed in support of the former motion, giving the date of that motion and the name of the deponent, would be read. Defendant objected that the affidavit could not be read, as the date of filing was not given.

Grayson Smith, for plaintiffs.

W. H. Blake, K.C., for defendants.

THE MASTER held that the notice of the intention of reading the affidavit objected to was sufficient, and the affidavit might be read. *Mackenzie v. Carter*, 12 P. R. 544, distinguished. *Clement v. Griffith*, 1 Co. P. C. 470, *Munro v. Wivenhoe*, 4 De G. J. & S. 723, *Daniell's Ch. Pr.* 6th ed., p. 538, *Bloxham v. Metropolitan R. W. Co.*, 16 W. R. 490, *Downing v. Falmouth*, 37 Ch. D. 234, 242, and Rule 524, referred to.

The action was brought to recover certain interest on \$10,400 under an agreement dated 19th June, 1899, whereby the purchasers therein named (represented by defendants) agreed to deliver to the vendors (represented by plaintiffs) within three years from that date fully paid up shares of the aggregate par or face value of \$10,400 in the stock of the company to be formed by the amalgamation of the Hamilton Street Railway Company and certain other companies, and whereby it was also agreed that if the stock should not be assigned by the purchasers to the vendors within twelve months, the purchasers should pay to the vendors half-yearly, from the expiration of twelve months from the date of the agreement, interest at four per cent. per annum on \$10,400 until the assignment and transfer should take place. Default having been made, this action was brought. By paragraph 2 of the defence it was alleged that the purchasers frequently offered to carry out the exchange of stocks as provided in the said agreement, and offered to transfer to plaintiffs \$10,400 par value, but the plaintiffs refused to make such exchange. The Master held that defendants should be ordered to give particulars of this paragraph, limited to the date or dates of the offer or offers, whether orally or in writing, and by whom made, and the act or acts of plaintiffs by which they refused to make such exchange, and whether

such refusal was oral or in writing, with dates and names of persons. As to the 3rd paragraph, particulars should be delivered of dates on which the intimation was made to plaintiffs, and whether orally or in writing, and by whom made. As to the 4th paragraph, the real intention of the agreement was sufficiently set out in the 3rd paragraph. As to the 5th paragraph, the particulars ordered of the 2nd paragraph would cover what was asked.

Order accordingly. Costs in the cause.

WINCHESTER, MASTER.

FEBRUARY 26TH, 1903.

CHAMBERS.

HAMILTON v. MUTUAL RESERVE FUND LIFE ASSN.

Writ of Summons—Service out of Jurisdiction—Application for Order for Leave to Issue Writ — Affidavit — Requirements of—Intituling—Service of Writ and Statement of Claim—Time for Appearance and Defence—Christmas Vacation—Irregular Judgment—Setting aside.

Application by defendants for an order setting aside a judgment entered against defendants on 19th January, 1901, for default of appearance, and a writ of execution issued thereon, and extending time for entering appearance, and setting aside service of the writ of summons for irregularity. Notice of the writ of summons was served on defendants out of the jurisdiction.

Shirley Denison, for defendants.

D. L. McCarthy, for plaintiffs.

THE MASTER held that the affidavit read in support of plaintiffs' application for the order to permit the issue of the writ and service of notice of it out of the jurisdiction did not comply with the requirements of Rule 163, in that it did not shew that in the belief of the deponent the applicant had a right to the relief claimed. *Perkins v. Mississippi S. S. Co.*, 10 P. R. 198, referred to. Also, that the affidavit should have been intituled "In the matter of an intended action between," etc. The objection to the affidavit was well taken, but the defects could have been remedied upon the present application by plaintiffs supplying the information omitted; but, as the judgment was prematurely signed, there was no object in allowing plaintiffs an opportunity to remedy the defects.

The order allowing the service limited the time for entering appearance and delivering defence to 15 days, inclusive of the day of service. The notice of the writ and the statement of claim were served on defendants at their head office in New York on 27th December, 1902—in vacation. Judgment was signed on 19th January, 1903. The judgment recited that defendants had not appeared and had not delivered any statement of defence, and adjudged that plaintiffs recover \$2,033.33 and costs to be taxed. These costs were taxed at \$17.46, which indicated that the costs respecting the statement of claim were allowed. The period from the 27th December to the 6th January was not to be reckoned in the time allowed for delivering a statement of defence, and the order did not provide that it should be so reckoned. *Thompson v. Howson*, 16 P. R. 1, distinguished.

The judgment was therefore signed too soon.

Order made setting aside writ of summons and all subsequent proceedings with costs.

MEREDITH, C.J.

FEBRUARY 27TH, 1903

TRIAL.

McAVITY v. JAMES MORRISON BRASS MFG. CO.

Patent for Invention—Trade Mark used in Connection with—License—Agreement—Construction—Declaration of Rights—Specific Performance—Injunction—Misconduct Disentitling Party to Equitable Relief.

The plaintiffs, the Hancock Inspirator Company, a manufacturing company having its head office at the city of New York, and T. McAvity & Sons, brass manufacturers carrying on business at the city of St. John, New Brunswick, sued the defendant company, brass manufacturers carrying on business at Toronto, in respect of two specific trade marks owned by plaintiff company, registered on 24th March, 1880, one consisting of the word "Inspirator" and the other of the words "Hancock Inspirator," as applied to the sale of injectors, and in respect of two patents of invention for improvements in injectors, of which the plaintiff company were the assignees. One of these patents (7011) was held to have become void under the provisions of sec. 28 of the Patent Act of 1872: *Mitchell v. Hancock Inspirator Co.*, 2 Ex. C. R. 539. On 16th May, 1901, an agreement was entered into between plaintiff company and plaintiffs T. McAvity &

Sons, by which plaintiff company granted to T. McAvity & Sons (subject to the right of revocation) the exclusive license to manufacture at their factory in St. John and to sell within the Dominion of Canada, and for use only within the Dominion, "inspirators containing and embodying the inventions and improvements and any and all substantial and material parts of the same which are shewn and described in the said letters patent (No. 44062) for the term of the said letters patent and for any extension thereof which may be granted." The plaintiffs T. McAvity & Sons, under the authority of their license, had been for some time manufacturing inspirators for use on locomotive boilers which were called and known to the trade as "Hancock locomotive inspirators," and a considerable and valuable market had been obtained for them under that name.

The plaintiffs complained that the defendants were selling, and representing that they had the sole right to manufacture and sell, Hancock locomotive inspirators; and plaintiffs claimed a declaration that T. McAvity & Sons were the only persons entitled to manufacture and sell the Hancock locomotive inspirators in Canada, an injunction restraining defendants from manufacturing, selling, or representing that they had the right to manufacture and sell, the articles in question, and damages.

The defendants justified under an agreement made between plaintiff company and one James Morrison, whose business defendants succeeded to in the early part of 1893. This agreement was dated 10th March, 1886, and was entered into after it had been decided that patent No. 7011 was null and void, and in consequence of that decision. By this agreement it was provided that from and after the date of it, Morrison should have the sole right in the Dominion of Canada to the use of the trade marks belonging to plaintiff company known as the "Hancock inspirator" and "inspirator," such trade marks to be used by Morrison only in connection with the sale of inspirators which shall be manufactured by him as described in the letters patent No. 7011 of the Dominion of Canada granted to John T. Hancock on 24th January, 1877, and subsequently extended by patent to No. 13958 and No. 13979.

L. G. McCarthy, K.C., and A. M. Stewart, for plaintiffs.

G. H. Watson, K.C., and Grayson Smith, for defendants.

MEREDITH, C.J. (after stating the facts at length):—It is not, in my opinion, open to question that the right of Morrison under the agreement to use plaintiff company's trade

marks is limited to the use of them as applied to a device manufactured in accordance with the specifications annexed to letters patent No. 7011, and that no right is conferred upon him of using them in connection with or as applied to anything else, and therefore no right of using them in connection with the device for which the letters patent No. 44062 were granted.

It is not material to inquire, if that inquiry were open to defendant company in this action, whether patent No. 44062 was or is a valid patent, or whether it has not been rendered null and void by breach or non-observance of any of the provisions of the Patent Act. Granting that it is open to any one, and therefore to defendants, to manufacture or sell the device for which that patent was obtained, it is clearly, I think, not open to them to use plaintiff company's trade marks in connection with or to apply them to the article which they may so manufacture or sell.

Nor is it, I think, open to defendants to raise in this action any question as to the validity of patent No. 44062. Plaintiffs' claim does not rest upon that patent, nor is the question of its validity material to the disposition of their claim.

If plaintiffs were suing for an infringement of the patent, such a defence would or might be open, but the right to impeach the patent . . . can be enforced only by *scire facias* or in the Exchequer Court.

The agreement between Morrison and plaintiff company also provided that "in the event of the parties of the first part (plaintiff company) obtaining within the Dominion of Canada any letters patent for improvements in inspirators, they will give to the said party of the second part (Morrison) the first opportunity of entering into arrangements with them for the sale and exclusive manufacture, use, and sale of the said patented inventions within the Dominion of Canada."

* * * * *

This provision is so indefinite and incomplete that specific performance of it is out of the question: *Huff v. Shepard*, 58 Mo. 242; *Fogg v. Price*, 145 Mass. 513, and cases there cited.

It was further argued that the conduct of plaintiff company had been such as in any case to disentitle them to an injunction. . . . In view of all the circumstances, the defendants have not, I think, made a case which would, on the principles upon which a court of equity acts in granting equitable relief, justify me in refusing to grant the relief which plaintiffs seek and which is necessary to be given to

prevent their property rights being seriously affected by acts of defendant company done without justification or lawful excuse.

Upon the whole case, I am of opinion that plaintiffs are entitled to the relief claimed, except the declaration which is asked as to the rights of plaintiffs T. McAvity & Sons, which, it seems to me, is not necessary or proper to be made; and that the injunction should be in such terms as not to interfere with any right which defendants may have to use plaintiff company's trade marks in connection with the sale in Canada of inspirators manufactured by them as described in letters patent No. 7011, or with their representing that they are entitled to the rights (limited to inspirators so made and to them only) which were granted by plaintiff company to Morrison by the agreement of 10th March, 1886.

No attack is made by plaintiffs in the pleadings upon the right of defendants, as assignees of Morrison, to do what Morrison was by the agreement of 10th March, 1886, licensed to do, and I have, therefore, not considered whether or not the license to Morrison was assignable; nor, in the view I have taken, have I found it necessary to consider other questions otherwise of more or less importance which were discussed upon the argument.

The plaintiffs are entitled to their costs.

FEBRUARY 28TH, 1903.

DIVISIONAL COURT.

JACKSON v. McLAUGHLIN.

Appeal—Refusal to Reverse Findings of Court below on Weight of Evidence—Correction of Manifest Error.

Appeal by defendant from judgment of County Court of Essex in favour of plaintiff for \$181.50, claimed as and for wages due from defendant to plaintiff.

The appeal was heard by STREET, J., and BRITTON, J.

R. U. McPherson, for defendant.

J. H. Rodd, Windsor, for plaintiff.

STREET, J.—The evidence was of the most conflicting character, and we have not in coming to a conclusion upon the appeal before us the aid of knowing the reasons upon which the learned Judge proceeded. We can only assume

that he did not believe the evidence given on the part of defendant, and that he did believe that of plaintiff and his witness. The question is one entirely of fact, which depended upon the degree of credit to be attached to the conflicting statements of the witnesses. . . . My brother Britton, however, points out what appears to have been an error of the learned Judge. . . . This should be corrected. In other respects the appeal must be dismissed, and the appellant should pay the costs.

BRITTON, J., delivered a written opinion in which he agreed in dismissing the appeal, but pointed out that the plaintiff had been allowed for two weeks' wages at \$6 a week in excess of what his actual claim was, and that the judgment should be reduced by \$12.

FEBRUARY 28TH, 1903.

DIVISIONAL COURT.

WHITESELL v. REECE.

Tenant for Life—Waste—Cutting Timber—Remaindermen—Injunction—Payments by Tenant for Life on Mortgage Given to Secure Annuity—Subrogation.

Appeal by defendants from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 516) in favour of plaintiffs for a perpetual injunction. \$400 damages, and costs, in an action by the persons entitled under the will of G. Scealey, deceased, to an estate in remainder in certain lands in the township of Bayham, against the life tenant and the purchaser from her, to restrain waste by cutting timber, etc. The testator died on 13th May, 1894, seised in fee of the land, subject to a mortgage made by him on 2nd December, 1886, to trustees for his wife to secure to her an annuity for her life of \$200. At the time of the testator's death he was living apart from his wife, and she was about 75 years of age. She was still living at the time of this appeal. Since the testator's death the defendant Reece had paid the annuity to the widow. On 14th March, 1902, defendant Reece sold to defendant Payne, for \$140, certain timber on the land, to be taken off in two years, and Payne cut down and removed a quantity of timber. He alleged that he purchased in good faith, believing his co-defendant had a right to sell. The defendant Reece set up that having paid eight instalments of the annuity, she was entitled to be subrogated to the rights of the mortgagee in

respect thereof against the land, and, being so subrogated, the land was an insufficient security for her claim against it, and she had a right to cut down the timber; and further that the timber was cut down for the purpose of clearing the land for cultivation, and no waste was committed.

J. A. Robinson, St. Thomas, for defendants.

D. J. Donahue, K.C., for plaintiffs.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.—I think *Yates v. Yates*, 28 Beav. 637, is not distinguishable in principle from the present case. There it was held that the periodical payments of an annuity charged on land by the testator in favour of his widow should be apportioned between the value of the life estate and the value of the reversion. . . . *Re Muffett*, *Jones v. Mason*, 39 Ch. D. 534. We have not before us a basis upon which to work this calculation out exactly, for the purpose of ascertaining the share of the debt for which defendant Reece is entitled to a charge. . . . Taking the value of the land at the testator's death at \$2,500, which is the value placed on it by many witnesses, the security for the sums paid by defendant Reece beyond her proportionate share cannot be said to be inadequate so as to entitle her to cut down the timber, under the authority of *Brethour v. Brooke*, 23 O. R. 658. I find no reason, therefore, to dissent from the conclusion at which the Chief Justice arrived as to the liability of defendant Reece for the acts complained of. I quite concur in the finding that these acts were not done for the purpose of clearing the land for cultivation, and the result of them has been undoubtedly greatly to diminish the value of the property. The amount found payable in respect of the damage is not excessive. . . . Instead of the payment into Court of \$400 to remain there during the life of defendant Reece, she receiving the interest meantime, she should at once pay to plaintiffs the present value of that sum, viz., \$180. and judgment varied to that extent. Any rights defendant Reece may have to recover the sums, if any, which she has paid upon the annuity beyond her due proportion must be enforced in another action. They form no defence to the claim of plaintiffs here, and no relief by way of counterclaim in respect of them has been sought.

Appeal dismissed with costs.

WINCHESTER, MASTER.

FEBRUARY 27TH, 1903.

CHAMBERS.

REX EX REL. MCCALLUM v. MCKIMM.

Municipal Elections—Controverted Election—Application in Nature of Quo Warranto—Practice—Affidavit—Irregularity—Waiver—Notice of Motion—Personal Service—Disqualification of Member of Council—Member of School Board—Statute—Construction—Costs.

Summary application in the nature of a quo warranto to set aside the election of George Frederick McKimm as mayor of the town of Smith's Falls, upon the ground that he, at the time of the election, was disqualified by reason of his being a member of the public school board of that town, being "a public school board for which rates are levied."

The motion was made returnable on the 16th February, but was on that day adjourned at respondent's request till the 20th February, no objections being specifically mentioned, but "reserving all objections, technical and otherwise—affidavits in answer to be served on 18th inst.—to-day being the last day for proceeding, the 20th instant to be treated as the last day as far as the objections above reserved are concerned." On the 18th February the respondent's solicitor served the relator's solicitor with copies of affidavits in answer.

Upon the application coming on for hearing on the 20th February, G. H. Watson, K.C., for the respondent, objected that no affidavit had been filed by the relator in support of the application for a fiat to serve the notice of motion, inasmuch as the paper filed purporting to be an affidavit did not contain the words "make oath and say;" also that the notice of motion had not been properly served. In support of the first objection he cited *Allen v. Taylor*, L. R. 10 Eq. 52; *Phillips v. Prentice*, 2 Hare 542; and *Re Newton*, 2 De G. F. & J. 3.

J. H. Moss, for the relator.

The motion was also argued upon the merits.

THE MASTER.—It is true that in the cases cited by Mr. Watson affidavits without the words "make oath and say" were not admitted until resworn after being altered. In the first mentioned case *James, V.-C.*, held that the affidavit must be altered and resworn unless the other side waived the objection. It was, however, held in *In re Torkington*, L. R. 9 Ch. 298, that an affidavit, omitting by mistake the words "severally make oath and say," having been filed, it was too late

to object to it. See also *Regina ex rel. Bland v. Fogg*, 6 U. C. L. J. 44, 45; *Regina ex rel. Linton v. Jackson*, 2 C. L. Ch. 26. . . . It is clear from the above cases that the affidavit in question is only irregular, and not invalid, as was contended. It was the duty of the respondent . . . to move to set aside the proceedings in consequence of such irregularity, and that within a reasonable time, under Rule 311. . . . A "fresh step" was taken by the respondent in making and serving his affidavits on the merits before taking the objection. I do not refer to the asking of an enlargement without mentioning the objection. The Rules of Court have been applied to proceedings to set aside a municipal election: *Rex ex rel. Roberts v. Ponsford*, 3 O. L. R. 410, 1 O. W. R. 223, 286. In any case I would, if necessary, give the relator the privilege of remedying the defect *nunc pro tunc*, but I do not think that is required under the circumstances.

With reference to the service of the notice of motion, the relator has filed an affidavit of personal service on the respondent. The respondent states that the clerk of the relator came into his office while he was engaged in some work and laid an envelope upon the counter in the office some distance from him, without calling his attention to the envelope or speaking to him in any way, and immediately thereafter left the office. In the course of about half an hour, seeing the envelope lying on the counter, the respondent picked it up without knowing its contents, and found that it contained the notice of this motion and fiat. This affidavit is corroborated by the affidavit of a clerk who was present. . . . These affidavits shew conclusively that the respondent personally received the papers in question on the date mentioned in the affidavit of service, and that has been held to be a sufficient service: *Williams v. Pigott*, 5 Dowl. 320; *Woodside v. Toronto Street R. W. Co.*, 2 Ch. Ch. 24; *Keachie v. Buchanan*, *ib.* 42.

As to the merits, the affidavits of the relator and respondent both shew that the respondent was on the day of nomination for mayor a member of the school board of the town of Smith's Falls, for which he was elected mayor. He thus falls within the provision of 2 Edw. VII. ch. 29, sec. 5 (O.), which amends sec. 80 of the Municipal Act by making it provide that "no member of a school board for which rates are levied" shall be qualified to be a member of the council of any municipal corporation. . . . It was argued that the saving clause in the amending Act, namely, "but this amendment shall not apply so as to disqualify any person

ected prior to the passing of the Act," relieved the respondent from the disqualification, as he had been elected trustee, or a member of the school board, prior to the passing of the Act. In my opinion, this contention cannot be sustained. The statute is dealing with members of municipal councils mentioned in sec. 80 of the Municipal Act elected prior to the passing of the Act of 1902, and their disqualification, and not the election of members of school boards. As to the time of the disqualification, I would refer to *Regina ex rel. Rollo v. Beard*, 6 U. C. L. J. N. S. 126.

I therefore hold that the election of the respondent . . . must be set aside and a new election had. For the reasons mentioned at the end of the judgment in *Regina ex rel. Rollo v. Beard*, the respondent must be unseated with costs.

FEBRUARY 27TH, 1903.

DIVISIONAL COURT.

RUSSELL v. EDDY.

*Costs—Third Party—Dismissal of Action—Plaintiff Ordered to Pay
Costs—Rule 214—Discretion—Appeal.*

Appeal by plaintiff from judgment of MEREDITH, J., dismissing the action, and directing that plaintiff should pay the costs of a third party brought in by defendant, as well as defendant's costs.

W. H. Blake, K.C., for defendant, contended that defendant should in any event pay the costs of the third party.

T. E. Godson, Bracebridge, for defendant, contra.

The appeal was dismissed as to the merits at the argument. Judgment was reserved as to the question of costs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was now delivered by

MEREDITH, C.J.—It was contended that the trial Judge had no power under the Rules to order a plaintiff whose action is dismissed to pay the costs of a third party, and in support of this contention *Tomlinson v. Northern R. W. Co.*, 11 P. R. 419, 526, and *Williams v. South Eastern R. W. Co.*, 26 W. R. 352, were cited.

Since these cases were decided a new Rule on the subject has been adopted in this Province. It was passed on the 23rd June, 1894, and is now Rule 214, and is the same as the English Order 16, r. 54, which was passed probably in consequence of the decision in *Witham v. Vane*, 32 W. R. 617, and came into force on the 24th October, 1883: *Snow's Annual Practice*, 1903, p. 203.

Rule 214 clearly, I think, gives power to the Court to order a plaintiff whose action is dismissed to pay the costs of the third party as well as of the defendant, and, if this be so, the matter is one of discretion, and there is no appeal unless by leave of the Judge, and his leave has apparently not been asked, and has not been obtained.

Tomlinson v. Northern R. W. Co. is therefore now useful only as a guide to the Judge in the exercise of his discretion. Appeal dismissed with costs.

FEBRUARY 28TH, 1903.

DIVISIONAL COURT.

HIXON v. WILD.

*Mortgage—Covenant against Incumbrances — Breach — Damages—
Measure of—Costs—Payment into Court.*

Action for damages for breach of covenant against incumbrances contained in a mortgage deed made by defendant to plaintiff. The trial Judge found for the defendant. The plaintiff appealed to a Divisional Court, which reversed the judgment and directed a reference to the Master in Ordinary to assess the plaintiff's damages. The Master assessed these damages at \$2,064, being the amount of a mortgage (and interest) made by defendant in favour of Ann McKenzie, which was the incumbrance constituting the breach of the covenant.

The defendant appealed to a Divisional Court from the Master's report, and the plaintiff moved the same Court for judgment on further directions and costs.

R. McKay, for defendant.

A. O'Heir, Hamilton, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MACMAHON, J.—We are concluded as to the damages by *McGillivray v. Mimico Real Estate Security Co.*, 28 O. R. 265. The defendant's appeal will, therefore, be dismissed.

There will be judgment for plaintiff for the amount found due by the report, together with subsequent interest and the costs of the action, and of the appeal from the judgment of the trial Judge, and of this appeal and of this motion for judgment, to be added to plaintiff's claim. But the amount at which the damages were assessed will not be paid to plaintiff, but into Court subject to further order, or, at his option, defendant may pay off and discharge the mortgage to Ann McKenzie. This direction was consented to by counsel for plaintiff.

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MEREDITH, C.J.

MARCH 2ND, 1903.

CHAMBERS.

VALENTINE v. JACOB.

Administration—Distribution of Fund in Court—Period for Ascertainment of Class—Vesting Order—Costs—Unnecessary Litigation.

Motion on behalf of plaintiff and defendants Hesson and McGregor in an action to remove trustees and for administration, for an order dispensing with payment into Court of \$595.84 and for distribution pursuant to the report of the local Master at St. Thomas dated 6th December, 1902.

W. J. Tremear, for applicants.

W. E. Middleton, for other defendants.

MEREDITH, C.J.—The order must be refused. The report is wrong in finding that such of the brothers and sisters of defendant Madeline Valentine named in paragraph 3 as survive her are the only persons who are entitled to share in the corpus of the trust fund. As much as \$6,000 not having been realized from the sale of the trust property, defendant Madeline Valentine is entitled to the whole income of the fund for her life, and the trust as to the corpus is, if at her death there are surviving brothers and sisters, to divide it equally between them, but if all the brothers and sisters be then dead, the corpus is to go to their respective heirs. The class that is to share in the corpus is, therefore, not ascertainable until the death of Madeline, and there should be no order for distribution until that event has happened and the class has been ascertained.

A vesting order was improperly granted, the purchase money not having been paid into Court.

The costs of the litigation have been very great. Apart from the contest as to the alleged misappropriation by two of the trustees of part of the trust fund, which was abandoned at the trial, it is difficult to understand why any suit was necessary, as all that has been obtained might have been gotten by the appointment of a new trustee in the place of the one who had become a lunatic, and a sale by the trustees out of Court.

Order made referring report back to Master for amendment, and application may be renewed in Chambers when the amended report is made. Parties to consider whether the unascertained class should not be represented.

MEREDITH, C.J.

MARCH 2ND, 1903.

WEEKLY COURT.

STEWART v. GUIBORD.

Equitable Execution—Declaration of Right to Apply Amount Due to Plaintiff by one Defendant upon Judgment against Co-defendant—Appearance—Attornment to Jurisdiction.

Appeal by defendants from report of local Master at Ottawa.

J. A. Ritchie, Ottawa, for defendants.

Glyn Osler, Ottawa, for plaintiff.

MEREDITH, C.J.—The appeal, so far as it affects defendant Lallemand, fails. Whether or not he was before appearance subject to the jurisdiction of the Court, he has by appearing unconditionally submitted to and cannot now question the jurisdiction.

The appeal of defendant Guibord must be allowed. Plaintiff asks that Guibord may be declared a trustee of a fund for the judgment debtor Lallemand, in order that plaintiff may in some way apply what he owes to Guibord upon the judgment against Lallemand. There is no ground for such an action. Plaintiff must be left, if he can do so, to set off his judgment against Lallemand in any action which Guibord may bring for the recovery of what plaintiff covenanted to pay to him.

Lallemand's appeal dismissed with costs. Guibord's appeal allowed without costs. If counsel desire that judgment should go upon the Master's report as varied upon the appeal,

the action is to be dismissed as against Guibord without costs, and without prejudice to any right of set-off which plaintiff may have in respect of the judgment against Lallemand, and plaintiff is to have judgment against Lallemand for the amount found due by the report with subsequent interest and costs.

WINCHESTER, MASTER.

MARCH 3RD, 1903.

CHAMBERS.

RE WEBB.

Life Insurance—Bequest of Proceeds to Infant—Right of Executors to Payment—Law of Domicil of Insured—Payment of Money into Court.

Motion by the Grand Orange Lodge of British America for leave to pay into Court \$1,000, being the amount of an insurance on the life of T. H. Webb, deceased. He insured in favour of his wife while living in Ontario, but subsequently removed his family to Manitoba, where his wife died. In his will he made several specific devises, and added: "And I give, devise, and bequeath all other my messuages, lands, tenements, and hereditaments, and all other my household furniture, ready money, security for money, my life insurance in the Orange Mutual and Confederation Life Insurance Companies, my crops, horses, stock, machinery, goods and chattels, and all other my real and personal estate whatsoever and wheresoever unto my . . . son Thomas William McEwan Webb, to be held by my executors in trust for him until he is 21." The executors applied to the applicants for payment of the \$1,000 insurance moneys, but, upon being requested to execute, as trustees, a release in respect of the sum to be paid, they refused to do so, asserting that they were entitled to payment as executors either for the benefit of the infant or of the estate of the deceased as might be determined by the law of Manitoba.

W. D. Gwynne, for applicants.

Shirley Denison, for executors.

THE MASTER referred to *Scott v. Scott*, 20 O. R. 313, and *National Trust Co. v. Hughes*, 14 Man. L. R. 41, and said that if the executors desired to raise similar objections to those raised in the latter case, such objections could be best disposed of on motion for payment of the fund out of Court. Upon filing an affidavit as to the infant's age, as required by Rules 411 and 418, an order would be made as asked.

BOYD, C.

MARCH 3RD, 1903.

CHAMBERS.

BALDWIN IRON AND STEEL WORKS (LIMITED) v.
DOMINION CARBIDE CO.

*Costs—Scale of—Jurisdiction of County Court—Recovery of \$550—
Ascertainment of Amount—Promissory Note—Consideration—
Necessity for Extrinsic Proof.*

Appeal by defendants from taxation of plaintiffs' costs by the local Master at Ottawa. The action was brought to recover \$1,100, being the balance alleged to be due on two promissory notes made by defendants to plaintiffs; and \$162.75 for work done and machinery and supplies sold. The action was tried before MEREDITH, C.J., who gave judgment for plaintiffs for \$550 with interest and costs (ante 6). The Master taxed the costs upon the High Court scale.

J. F. Smellie, Ottawa, for defendants, contended that the amount recovered was within the jurisdiction of a County Court.

R. G. Code, Ottawa, for plaintiffs.

BOYD, C.—The note for \$863 dated 28th March, 1900, was that in respect of which the plaintiffs recovered judgment to the extent of \$550 with interest from 31st December, 1901. The note was for supplies of material prior to its date and running from the end of July, 1899, to the end of February, 1900. While the company defendant existed ostensibly prior to its actual incorporation, still it had no legal status till December, 1899, and it was not an organized company till February, 1900. This note was taken up by the note of McRae (by whom the ostensible company had been carried on prior to the incorporation), and it was at last represented by a note of McRae for \$1,100, which was the total amount sued for by plaintiffs, as being really a company debt, with McRae intervening as surety merely.

The plaintiffs could not recover in this case on the mere proof of the note for \$863; that had gone out of currency, and was represented by the \$1,100 note of McRae, on which proof had been made in McRae's estate. One contention was that this discharged the company.

Again, the mere proof of the note did not ascertain the amount, because the consideration therefor was rendered in great part before the company existed, and proof had to be made extrinsic to the note, to give good ground for recovery against the company.

I have spoken to the Chief Justice (the trial Judge), and he has no doubt of plaintiffs' right to recover full costs of suit in the High Court, and had his attention been directed to it, he would have certified accordingly. This he is willing now to do, nunc pro tunc.

Altogether I see no reason to disturb the scale of taxation, and the appeal is dismissed with costs.

BRITTON, J.

MARCH 3RD, 1903.

TRIAL.

SMITH v. HARKNESS.

Bankruptcy and Insolvency—Assignment for Creditors—Claim to Rank on Estate—Action for Declaration—Costs.

Action by H. G. Smith and the firm of Smith & McLennan, of which firm H. G. Smith was senior member, against defendant as assignee for benefit of creditors of J. B. Coulthart, upon an account for services, timber supplied in 1901 and 1902, for payments, indorsations, etc.

D. B. Maclellan, K.C., for plaintiffs.

J. Leitch, K.C., for defendant.

BRITTON, J., gave judgment for plaintiffs for \$3,836.89 and a declaration that plaintiff Smith is entitled to rank upon the estate of J. B. Coulthart for that sum and be paid a dividend thereon, and a declaration that defendant as assignee is entitled to be paid \$1,265.69, and interest. As this was a case in which there was not before action any admission of any specific amount in favour of plaintiffs, and as they were by the notice disputing their claim compelled to bring an action, plaintiffs should get costs, less any costs specially incurred by defendant, if any, in proving the claim for sawing and in resisting the claim for set-off. Plaintiffs to get general costs of action.

STREET, J.

MARCH 3RD, 1903.

TRIAL.

CITY OF TORONTO v. CONSUMERS' GAS CO. OF TORONTO.

Gas Company—Breach of Statutory Duty—Action by Consumers—Accounts—Book-keeping Methods—Reserve Fund—Profit and Loss—Plant and Buildings Renewal Fund.

Action by the Corporation of the city of Toronto, suing on their own behalf as well as on behalf of all other consumers of gas furnished by defendants, and by Joseph A. Black,

a holder of defendants' shares, suing on behalf of himself and all other shareholders, against the company, alleging certain breaches by defendants of their duties under 50 Vict. ch. 85 (O.), and praying that they may be ordered to perform them, and that accounts may be taken of their assets and the manner in which they have dealt with them since the passing of the Act, and that certain alleged improper dealings of defendants with their assets and certain alleged improper entries in their books may be corrected, and that their accounts may be retaken so as to comply with the Act; also alleging that by reason of the breaches of duty aforesaid, and by their improper method of dealing with their assets, and keeping their accounts, the price of gas supplied to plaintiffs and other consumers has been kept at a higher figure than it should have been in accordance with the Act, and asking for an account of the sums so overcharged to plaintiffs and for repayment and for other relief.

E. F. B. Johnston, K.C., and A. F. Lobb, for plaintiffs.

S. H. Blake, K.C., and A. B. Aylesworth, K.C., for defendants.

STREET, J., held that plaintiffs were not only in error in their contention that the reserve fund had not been properly maintained, but had entirely failed to shew that they had been injured by the manner in which it had in fact been kept.

The second complaint was, that certain sums written off the company's assets had been charged to profit and loss or reserve fund, instead of to the plant and buildings renewal fund. The defendants were justified in writing these sums off the value at which their plant stood in their books, and it was a matter of no moment whether they were charged to profit and loss account or to the reserve fund, for the latter could only be increased from the former. The defendants were not bound under sec. 6 of the Act to charge these sums to the plant and buildings renewal fund, a charge for depreciation and loss not coming within the words "all usual and ordinary renewals and repairs." Even if it were held that the amounts written off the profit and loss account for depreciation, which amount in all to 321,431.38, should have been written off the plant and buildings renewal fund instead, the reserve fund would still be larger by the difference between these two sums, that is, by \$44,491.85, than it would have been had defendants exercised the full rights given them by the Act.

The third objection was, that defendants were not at liberty to continue to the plant and buildings renewal fund the five per cent. authorized by sec. 6, because it did not appear to be necessary to do so for the purposes for which the fund was to be used under the statute. It would be impossible to give effect to this objection without disregarding the plain and unambiguous language of the Act.

Action dismissed with costs.

OSLER, J.A.

MARCH 3RD, 1903.

CHAMBERS.

RANDALL v. OTTAWA ELECTRIC CO.

Leave to Appeal—Order of Divisional Court Refusing Nonsuit after Disagreement of Jury—Case Ripe for New Trial—Refusal of Leave Except on Terms.

Motion by defendants Ahearn & Soper (Limited) for leave to appeal from order of a Divisional Court (ante '146) dismissing a motion made by the applicants for a nonsuit after a disagreement of the jury.

W. Nesbitt, K.C., for applicants.

H. M. Mowat, K.C., for plaintiff.

OSLER, J.A.—The case being now ripe for a new trial, it is a fortiori not to permit a second appeal. When the case is tried again, the point which the applicants now rely on will be open to them, if not at that trial, yet on appeal to this Court if they should fail there. If they were allowed to appeal now, and this Court should be of opinion with the Court below that the case should be tried again, the plaintiff will have been unreasonably delayed by the appeal, and if he is permitted to proceed to his second trial pending the appeal, we may see, as in *Blackley v. Toronto Street R. W. Co.* and other cases, the appeal now sought for and the appeal from the judgment on the second trial side by side in the same docket. Either way delay or expense is inevitable if defendants' appeal should not succeed, and their success is not so probable as to justify the giving of leave to appeal, especially as a refusal does not foreclose the substantial defence, and (if plaintiff should recover his intellect) further evidence may be given at the next trial. If, indeed, the applicants are prepared to consent to judgment being entered for plaintiff for the damages assessed by the jury, in case the appeal they now seek for should be unsuccessful, they have leave to appeal. But, unless leave is accepted on these terms, the motion is refused.

MARCH 3RD, 1903.

ELECTION COURT.

RE SAULT STE. MARIE PROVINCIAL ELECTION.

SMITH v. MISCAMPBELL.

Parliamentary Elections — Corrupt Practices — Bribery — Proof of Offences—Proof of Agency—Hiring Vehicles — Election Avoided for Corrupt Acts of Agent—Saving Clause.

A petition to avoid the election of the respondent for corrupt practices, tried at Sault Ste. Marie and Toronto.

A. B. Aylesworth, K.C., for petitioner.

E. Bristol, for respondent.

The judgment of the Court (OSLER, J.A., and FALCONBRIDGE, C.J.) was delivered by

OSLER, J.A.—Sixty of the 91 charges in the particulars were disposed of at the hearing, and judgment was reserved on the remaining 31, which are, however, in substance reducible to 12. Of these 31 charges, numbers 16 to 20 refer to the bribery of Alexander Clouthier by one E. Morreault, an agent of the respondent, on 30th May, by the corrupt payment to him of the sum of \$5, in pursuance of a previous corrupt promise, and charges No. 22 and No. 25 refer to the bribery by Morreault of one Albert Roy by payment to him on 30th May of the sum of \$8, in pursuance of a previous corrupt promise.

The agency of Morreault was hardly contested. It was, at all events, if not admitted, abundantly proved. This gentleman was a member of the French Bar, and a resident of Montreal. At the request of some of the respondent's political friends there, he went to Sault Ste. Marie "to help in the election." There was a considerable French population in the riding, chiefly in and about the town, and it was thought desirable that some one familiar with that language should be sent up from the other Province, who could canvass his compatriots and address them at public meetings in their own tongue, the more so as it was said that an agent had been employed on the petitioner's side for a similar purpose. Mr. Morreault was to be paid his expenses and a honorarium, the amount of which was not very clearly defined—perhaps not at all—but he seems to have expected it would be at least \$10 per day. He left Montreal on 17th May, and before he did so received the proceeds of a draft for \$100, drawn upon the respondent by his friend in Montreal, which was duly

charged in the respondent's bank account on 14th June, 1902, and before he left Sault Ste. Marie on 30th May he was paid by or received from agents of the respondent there, and with his assent, further sums, amounting in all to \$135. None of these payments appears in the detailed statement of election expenses dated 28th July, 1902, prepared by the respondent's financial agent, pursuant to sec. 201 of the Election Act.

Morreault arrived at Sault Ste. Marie on the evening of Sunday the 18th May, and some time during the week opened a room in a building known as the Chamberlain block, in the French quarter, where people could call and see him, where the voters' lists could be examined, and inquiries answered. He was present at and addressed two public meetings in the interest of the respondent.

As regards the Clouthier charges, it appears that at Morreault's request he drove him about through the town to see his friends and make him acquainted with the French people. That he did so on two or three days, that Morreault never asked him which side he favoured, but the day after the election gave him \$5 for his services. This was simply a gratuity for services rendered, and not a corrupt payment. This group is, therefore, dismissed.

The Roy charges, or some of them, are of a much more serious character. Morreault met Roy in the afternoon of the 26th May, when, therefore, he had been a week at the Sault. One Honore Parent, an old acquaintance or friend of Morreault's, was with him. According to Parent's evidence, Morreault spoke to Roy first, and asked if he would work for him at his room, saying he would pay him \$3 or \$4 a day. Roy said he was a Liberal and would not sell his vote, to which Morreault replied that he did not want him to do so. Roy agreed to go there the next morning. He was there at Morreault's orders on the 27th, 28th, and 29th May, checking the voters' list—not a very arduous piece of work—answering inquiries, and going where he was sent. He seems to have been the only person so employed there. On the 30th May he was paid by Morreault for these services—according to his own account \$6 or \$7; according to Morreault's account \$7 or \$8.

Morreault's evidence was that he offered to employ Roy. "Never mind the party; if you'll work for me without party I'll pay you." He might have promised him \$3 or \$4 per day, not \$5.

Roy's evidence was that Morreault spoke to him, asked if he was a Canadian—meaning a French-Canadian—and what

his politics were. Roy said he was a Liberal, to which Morreault replied, "You're just my man." Morreault asked him if he would not vote for them. He said he would not. Asked if money would buy him, he answered no. Morreault asked if he would work for them, and witness said he would do so by day, but not at night, as he had a promise of work in the steel mills. He offered him \$5 per day to do their work, not specifying what it was to be, and to vote as he pleased. I think it must be inferred from Parent's and Morreault's evidence that at some stage of the conversation they depose to, the latter asked Roy for his vote. Parent gave his evidence, apparently, without bias, and commended himself to me as a witness truthful to the best of his recollection.

Upon the evidence which I accept on charges Nos. 22 and 25, I feel that it would be most unsafe to regard the payment as other than a payment made in pursuance of a corrupt promise. I find that these two charges are proved.

The remaining charges of this group are dismissed.

Charges 30 to 33. Corrupt payments by Morreault to one Delargey. Nos. 34 and 35, similar payments to one Daigle. Delargey and Daigle appear to have been persons of low character, described by more than one witness as "bums," but they were voters. Roy says they came to him two days before the voting day, and he spoke to Morreault about them, saying, "These two parties want to be kept till after the election is over." Morreault said, "You'll have to go down to the other committee room," the principal one. Roy went there with them and saw one Kearns, who told him that whatever Morreault would do was all right—he had authority. Roy took them back, told Morreault it would be all right. Delargey asked Morreault "what it would be," and he said "they would be satisfied." They said they would vote for, would support, the respondent. The next day Morreault gave Delargey 50 cents. Roy saw Morreault give Delargey money again, \$1. Delargey voted; Daigle did not. Roy further said that at the railway station, when Morreault was leaving, Delargey asked Morreault to keep his promise to "satisfy him." Morreault offered him \$1, which he would not take, saying it was not enough. Morreault told Roy to take him to the committee room, which he did, and left him there.

Morreault said that Delargey had been about his room "bothering" him; that Delargey followed him up to the station, and there, to get rid of him, he gave him \$1, intending to give only 50 cents. Interrogated very closely as to the payments of \$1 and 50 cents, sworn to by Roy, he could only say that he did not recollect them. There was no satisfactory evidence of Kearns's agency, but he was not called

to deny Roy's account of his interview. He was a resident of the town, and no explanation was offered for not calling him if his evidence would have assisted the respondent. Roy's evidence, therefore, remains unshaken upon two vital points on which it was open to contradiction, and I must hold that charges Nos. 30 and 32 (the latter as regards payment of money only) are proved. I attach no importance to the payment of \$1 at the station. It was probably made merely to get rid of a pestering tramp. As to the Daigle charges, the first, as to the promise, is proved; the second, as to the payment, is not.

Charges 54 to 57 inclusive. Charge 54, that on polling day one W. H. Plummer, an agent, gave Wm. Turpin two bottles of whisky, to be corruptly given by Turpin to voters. It was proved that Plummer gave Roy, on Turpin's order, two bottles of whisky some time during the afternoon of the polling day, one of which Roy handed to Turpin, but there was no evidence that the latter treated any elector with that whisky. This charge and charge 56, similar to charge 54, substituting Roy's name for Turpin's, are both dismissed.

Charge 55, that Plummer gave Turpin a sum of money to be expended (1) in bribing voters, and (2) for the purpose of corruptly providing meat, drink, and refreshment to voters on polling day. Plummer's evidence was that, some eight or ten days before the polling day, he, on his own account, employed Turpin to act as a sort of detective to spy upon and report the conduct of the petitioner's party. That he was to pay him for his services \$24. Plummer's blotter contained two entries, one for \$6 paid "Turpin," and later "Turpin in full \$10." The remaining \$8 were not accounted for. That any of the money received by Turpin from Plummer was actually expended in bribery, there is no evidence, and, therefore, however little confidence we may have that there was no unlawful expenditure of that kind, we cannot infer that the money given to Turpin was given for such purpose. The note or order (if Clapperton's evidence of its contents is true, and it was not denied by Plummer) contains a very damaging suggestion, and had there been any evidence of actual bribery by Turpin, it would. I think, have been difficult not to find the charge proved, apart from the question of agency, as an offence under sec. 159 (c) of the Election Act.

On the second branch of this item of the particulars, viz., the giving of meat, drink, or refreshment to a voter on account of his being about to vote, or having voted, etc., it was proved by Clapperton that he was a clerk in the grocery shop, or store, of one Gandreau, and that of the \$5 taken in

by the witness on polling day for whisky or beer supplied by way of treats to various persons, about \$3 was received from Turpin for that purpose. This would mean, as the witness said, a treat of 30 persons, unless some were treated twice. Probably the money thus expended by Turpin was part of the money he had received from Plummer, and, assuming that the persons so treated were voters, it would be a corrupt practice on the part of Turpin. But I do not find any section of the Act which enables me to fasten it upon Plummer as the person who supplied the money thus unlawfully expended by Turpin, as in the case of a person who advances money to be expended in bribery (sec. 59 (c)), or for the purpose of betting (sec. 164 (2)). Indeed, this form of stating a corrupt practice is, to me, quite novel. But even if the evidence can be regarded as sufficient to establish what sec. 162 (2) calls "extensive or general or miscellaneous" treating, or the corrupt practice struck at by sec. 163 (1), I think that agency has not been made out on the part of either Plummer or Turpin. The former was present as a delegate at the nominating convention, though how or when he was appointed did not appear. Then he spoke on behalf of the respondent at one or two meetings, and looked in at some of the smaller meetings,—the committee meetings; but is not shewn to have taken any part in them. He appears, in short, to have been a sort of free lance.

Charges 78 to 81, inclusive, and charge 90, are, except charge 90, personal charges in respect of the \$235 paid to Morreault, of which \$100 was paid by the respondent himself; \$110 by one Hand, an agent of the respondent, and \$25 by one Thompson, another agent; and both of the latter were paid with the respondent's assent or knowledge. I find that none of these sums were paid with any corrupt intention or for any corrupt purpose, or with intent that Morreault should expend them or any part of them corruptly. Morreault was not a volunteer nor a voter. He was a professional man, and the sum received by him was not an extravagant payment for his time and expenses. But, although it was not a corrupt payment, it was, I think, an illegal one. I find no authority to include a payment for the purposes Morreault was employed for (taking them as a whole) in the personal expenses of the candidate or his other election expenses. It was, at all events, illegal as not having been made through the respondent's financial agent, as required by sec. 197, and there was, moreover, in respect of it, a distinct infraction of sec. 201 of the Election Act in the omission to include it in the detailed statement of the candidate's election expenses. The transaction was a blameworthy one, well calculated to

excite suspicion, and, while the charges founded upon it must be dismissed, it will remain to be considered in another aspect of the case.

Charge 89, that one Penharwood, an agent of the respondent, committed the corrupt practice of voting, knowing that he had no right to vote, having been employed by the respondent as his paid agent and secretary in the conduct of the election, is dismissed. Penharwood's employment ceased at the end of April.

The remaining charges were of hiring rigs to convey voters to the poll. These should be dismissed, on the ground that no payment and no promise to pay had been proved.

I desire to record my opinion, that the law on this subject requires amendment. So long as carriages can be procured from liverymen for use on polling day, there is a constant temptation to evade the law and resort to all sorts of devices to do so. These people are not in politics, but in business, and in the long run they make sure that they shall not lose by nominally giving, as they do, to both political parties the use of their teams and carriages or other vehicles on polling day. Some such provision as is contained in the Imperial Act 46 & 47 Vict. ch. 51, sec. 14, sub-secs. 1, 2, and 3, prohibiting the letting, lending, or employing by any person of public conveyances or of any carriage or horse or other animal kept or used for the purpose of letting out to hire, would probably be found more effective than sec. 165 of our Act has been hitherto found to be.

In the result, the election ought, in my opinion, to be set aside. The case is not one in which the saving clause, sec. 172, of the Election Act, can properly be acted on. The acts of bribery proved, and the illegal practices connected with the employment of Morreault, ought, I think, to override any majority. Nor can it be overlooked that drinking was undoubtedly indulged in to a most reprehensible extent, though the evidence may fall short of proving the commission of corrupt practices in that respect. The Liquor License Act, indeed, would seem to be almost a dead letter in the town of Sault Ste. Marie.

Morreault, Roy, Delargey, and Daigle will be reported.

MEREDITH, C.J.

MARCH 4TH, 1903.

CHAMBERS.

CUSACK v. SOUTHERN LOAN AND SAVINGS CO.

Lost Document—Debenture—Action on—Indemnity—Costs—Tender.

Application by plaintiff for order approving of bond of indemnity tendered by her to defendants as sufficient security

for payment out of Court to her of moneys paid in by defendants, and disposing of the costs of the action, which was brought to obtain payment of a debenture for \$1,000 and interest issued by defendants to plaintiff, payable to her order, which she alleged was burned by mistake. Before action plaintiff tendered to defendants her own statutory declaration that the debenture had been inadvertently destroyed by her under circumstances which she detailed, and that she had never indorsed it, and she also tendered a bond to indemnify them for paying to her the amount of the debenture with interest. She demanded payment, but it was not made. Upon being served with the writ of summons, defendants paid into Court the amount of the principal money and the interest upon it, but conditionally on the money not being paid out until a sufficient bond had been furnished. Plaintiff then made this motion.

J. B. Davidson, St. Thomas, for plaintiff.

J. Farley, K.C., for defendants.

Counsel agreed that the Chief Justice should dispose of the whole matter in dispute upon this motion.

MEREDITH, C.J., held that, as plaintiff conceded defendants were entitled to indemnity, both parties were somewhat to blame for the litigation; and, under all the circumstances, the proper order to be made was that the bond of indemnity executed be delivered to defendants, and upon that being done the money in Court be paid out to plaintiff, and the action be discontinued, and that there be no costs to either party of the action or motion.

MEREDITH, C.J.

MARCH 4TH, 1903.

CHAMBERS.

SMERLING v. KENNEDY.

Security for Costs—Right to Praecept Order—Waiver by Delivery of Defence—Practice.

Appeal by plaintiff from order of Holt, Local Judge at Goderich, dismissing motion to discharge a praecipe order for security for costs issued by defendant Violet Kennedy. Plaintiff resided in the United States of America, as appeared by the indorsement on the writ of summons, and was not possessed of such property within the jurisdiction as relieved her from the obligation of giving security for costs.

W. Proudfoot, K.C., for plaintiff, contended that defendant had, by delivering her statement of defence before issuing the praecipe order, waived her right to it.

J. H. Moss, for defendant Violet Kennedy.

MEREDITH, C.J., held that the old practice is not superseded as to præcipe orders, and the common law practice is the more convenient practice, and the one which should be followed. *Bank of Nova Scotia v. Laroche*, 9 P. R. 503, *Caswell v. Murray*, 9 P. R. 192, and *Small v. Henderson*, 18 P. R. 314, referred to. Following that practice, the delivery of the defence was not a waiver of the right of defendant to a præcipe order, and the order was obtained in due time, as it was issued before issue joined. But in any aspect in which the question is looked at, the order in appeal was not open to the objection made to it.

Appeal dismissed with costs.

STREET, J.

MARCH 4TH, 1903.

TRIAL.

REX v. MULLEN.

Criminal Law—Application for Reserved Case after Conviction and Sentence—Statements of Jurors as to Manner of Arriving at Verdict.

The defendants were tried before STREET, J., at Ottawa, on 21st January, 1903, and convicted of an assault occasioning actual bodily harm. They were represented by counsel, who was present when the jury returned their verdict, and who addressed the Judge on 24th January, 1903, for the purpose of obtaining a lenient sentence. The defendants were then sentenced.

On 27th February, 1903, G. S. Henderson, Ottawa, on behalf of defendant Murphy, asked the Judge to state a reserved case under sec. 743, sub-sec. 2, of the Criminal Code, upon an affidavit by the counsel for the defendants to the effect that one of the jurors was not in favour of the verdict of guilty, and so informed the deponent, but that he and another juror, who was also for an acquittal, were led to believe by other jurors and the constable in charge that ten were sufficient to convict.

STREET, J.—There is no ground upon which to state a reserved case. No question of law arose in the course of the trial. It would be contrary to principle to allow the statements of jurors even under oath to be used for a purpose such as was here proposed: *Jackson v. Williamson*, 2 T. R. 281. It would be an extremely dangerous practice to permit the verdict of a jury to be disturbed in the manner or for the reasons suggested. Application refused.

MARCH 4TH, 1903.

DIVISIONAL COURT.

BURNETT v. BOCK.

*Fraudulent Conveyance—Status of Judgment Creditor Attacking—
Execution not in Hands of Proper Sheriff—Nature of Transac-
tions between Husband and Wife—Evidence—New Trial.*

Appeal by defendants (husband and wife) from the judgment of the District Court of Manitoulin in favour of plaintiff, a judgment creditor of the husband, but not having an execution against lands in the hands of the proper sheriff, in an action brought for the purpose of reaching for the satisfaction of plaintiff's debt a house and lot in Gore Bay which plaintiff alleged was purchased by and with the moneys of the husband, and was procured by him to be conveyed to his wife without consideration and for the purpose of defrauding his creditors.

A. G. Murray, Gore Bay, for defendants.

W. N. Tilley, for plaintiff.

The judgment of the Court (MEREDITH, C.J., FALCONBRIDGE, C.J.) was delivered by

MEREDITH, C.J.—As the respondent had not an execution against lands in the hands of the proper sheriff, his only right of action was, on behalf of himself and all other creditors of his debtor, to have the declaration necessary to enable the creditors to reach the property pronounced by the Court, and possibly to have a judgment for the sale of the property; and the judgment appealed against was erroneous in providing for payment of plaintiff's claim only.

Upon the main question, the alleged fraudulent character of the transaction by which the property was conveyed to the wife, the trial Judge has not given sufficient weight to independent and unimpeached testimony in favour of defendants. Order made directing a new trial. Costs of the last trial and of this appeal to be costs in the cause unless the Judge at the new trial otherwise directs. The Court expresses a hope that the parties will adjust their disputes and render a new trial unnecessary.

MARCH 4TH, 1903.

DIVISIONAL COURT.

METALLIC ROOFING CO. OF CANADA v. LOCAL
UNION No. 30, AMALGAMATED SHEET
METAL WORKERS' INTERNA-
TIONAL ASSN.

Writ of Summons—Service—Unincorporated Foreign Voluntary Association—Service upon Person in Ontario—Incapacity of Association—Proper Time to Raise Question.

Appeal by the Amalgamated Sheet Metal Workers' International Association from an order of MEREDITH, J., dismissing an appeal by them from an order of the Master in Chambers dismissing their motion to set aside the service of the writ of summons on them by serving one J. H. Kennedy. The appellants were added as defendants by an order not appealed against.

J. G. O'Donoghue, for appellants.

W. N. Tilley, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A.) was delivered by

MEREDITH, C.J.—The appellants, who are not sued as individuals, are neither a corporation nor a partnership nor an individual carrying on business in a name or style other than his own name, and it has not been made to appear that they have been given by the Legislature the capacity for owning property and acting by agents such as in *Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 429, it was held the Legislature had conferred upon the defendants in that case. . . . In a case such as this, where it appears clearly that the association sued is not an entity which may be sued by the name which it bears, it is a more convenient course to put an end to the litigation at the threshold than to permit it to proceed, with the certainty that the ultimate result will be the dismissal of the action as against the body improperly sued. *Sloman v. Governor of New Zealand*, 1 C. P. D. 563, and *Snow's Annual Practice*, 1903, p. 56, referred to. It is not necessary to go so far as to strike out the name of appellants as defendants; they have a right to complain that service has not been properly effected upon them: *Grossman v. Granville Club*, 28 Sol. Jour. 513. The Rules do not provide for the case of a voluntary association made a defendant, being neither a corporation, individual, partnership, nor a quasi-corporate

body such as defendants in the Taff Vale case. If an actionable wrong has been done to plaintiffs by the appellants, relief may be obtained in the manner pointed out by Lords Macnaghten and Lindley in the Taff Vale case, and as it was obtained in *Linaker v. Pilcher*, 84 L. T. 421.

Appeal allowed and order made setting aside service. No costs here or below to either party.

FALCONBRIDGE, C.J.

MARCH 5TH, 1903.

CHAMBERS.

SCHEEMAN v. DUNDAS.

Malicious Prosecution—Action—Dismissal for Want of Prosecution—Excuse for Delay—Leave to Proceed—Terms.

Appeal by plaintiff from order of local Judge at Godrich dismissing, for delay in proceeding to trial, an action for malicious prosecution.

W. Proudfoot, K.C., for plaintiff.

R. McKay, for defendant.

FALCONBRIDGE, C.J.—The local Judge was not wrong in making the order appealed against. But there was some excuse for plaintiff's delay in bringing the action on for trial, viz., the result of the question which was being settled in *Rex v. Scully*, 4 O. L. R. 394, 1 O. W. R. 452, and the disinclination which existed in the Attorney-General's department to deal with applications for fiats, pending that litigation. Order varied by directing that on payment of the costs of the motion before the local Judge and of this appeal, and on payment of \$40 into Court to answer pro tanto defendant's costs of the action, if he should become entitled thereto, all within three weeks after taxation of the costs, plaintiff may proceed to trial at the then next ensuing jury sittings; otherwise, appeal dismissed with costs.

MARCH 5TH, 1903.

DIVISIONAL COURT.

TAGGART v. BENNETT.

Costs—Scale of—Jurisdiction of Divisional Court—Action for Balance of Account—Ascertainment—Settled Account—Appeal to Divisional Court from County Court—Time—Extension of.

Appeal by plaintiff from judgment of Judge of County Court of Middlesex. The action was brought to recover \$41, the balance of an account which amounted to \$406.

Judgment was given for plaintiff's claim, but he was allowed only Division Court costs, on the ground that the action was within the jurisdiction of a Division Court. The defendant was not allowed a set-off of his excess of costs.

W. H. Bartram, London, for appellant.

W. H. Blake, K.C., for defendant.

BOYD, C.—There was ample evidence before the Judge that the account sued for was settled before action, and nothing was in dispute as to the amount due on the footing of the account. The defendant did not dispute that the amount was owing, but by way of counterclaim for inferior work it was sought to escape payment. The correspondence put in was sufficient evidence of a settled account, and the Judge inclined to take that view during the argument, and gave judgment on the footing that the claim sued for was the balance of a settled account and within the jurisdiction of a Division Court. He had also a discretion whether to award a set-off of costs or not, and he has exercised his discretion by leaving the matter with Division Court costs to plaintiff and no set-off. See *Re Lott v. Cameron*, 29 O. R. 73; Division Courts Act, sec. 72 (c) and sec. 79.

MEREDITH, J.—The judgment appealed from having been given on the 9th December, 1902, the appeal should have been set down for the sittings of a Divisional Court beginning 12th January, 1903 (Rules 352, 795), such sittings not being merely a postponed sittings, and the appeal having been set down for a later sittings was out of time, but the Court had power under Rule 353 to enlarge the time, and, as the appellant was misled by the change of date, the case was one for the granting of that indulgence. *Reekie v. O'Neil*, 31 O. R. 444, distinguished.

Upon the merits of the appeal MEREDITH, J., agreed with the conclusion of the Chancellor.

Judgment affirmed with costs.

MARCH 5TH, 1903.

DIVISIONAL COURT.

DAVIDSON v. GRAND TRUNK R. W. CO.

Railway—Animal Killed on Track—Liability—Proximate Cause—Fencing—Switch—Main Line—Intervening Lands.

Appeal by defendants from judgment of Judge of District Court of Muskoka, awarding to plaintiff \$75 damages. The

action was brought to recover the value of a cow, the property of the plaintiff, which was killed on the defendants' railway track. The plaintiff alleged that the death of the cow was caused by the negligence of the defendants in neglecting to repair a fence, through a breach in which the animal strayed on to the track.

D. L. McCarthy, for the appellants.

T. E. Godson, Bracebridge, for plaintiff.

The judgment of the Court (MEREDITH, C.J., STREET, J.) was delivered by

MEREDITH, C.J.—The facts being undisputed, the real question is whether, on these facts, the liability of defendants for the loss has been made out; and, upon a review of the facts, it appears that there was evidence sufficient to warrant the verdict for plaintiff, unless the effect of *Grand Trunk R. W. Co. v. James*, 31 S. C. R. 420, is to determine that upon the true construction of sec. 194 of the Dominion Railway Act, as amended by 53 Vict. ch. 28, sec. 2, the defendants are not liable because plaintiff's cow was killed not upon the switch on to which she escaped from the adjoining land of plaintiff, but upon the main line, on to which she did not escape directly from that land, but which she reached by crossing intervening lands. That case did not decide that where the statutory duty as to fencing is not performed, and in consequence of the breach of duty cattle of the landowner escape directly from his land on to the line of the railway, the railway company are liable only when the cattle are killed on the part of the line on to which they have escaped directly, and not where they are killed on another part of the line, to which they have strayed, after passing over intervening lands; and there is nothing in the Railway Act which renders it necessary to so decide. The breach of duty by the defendants was the proximate cause of killing the cow. The costs were in the discretion of the Judge, and he had not exercised it on a wrong principle or on a misapprehension of the facts.

Appeal dismissed with costs.

MARCH 5TH, 1903.

DIVISIONAL COURT.

ANDERSON v. CHANDLER.

Contract—Performance of Work—Discharge of Contractor—Certificate of Architect—Absence of Fraud.

Appeal by plaintiff and cross-appeal by defendants Walter and Annie Chandler from judgment of BOYD, C., in favour

of plaintiff against these defendants for \$650 without costs, ordering that \$400 deposited by plaintiff in the hands of defendant Gibson should be forfeited to defendants the Chandlers, and dismissing the action against Gibson with costs.

W. R. Riddell, K.C., G. Grant, and F. W. Halliday, for plaintiff.

D. E. Thomson, K.C., for defendants the Chandlers.

H. L. Drayton, for defendant Gibson.

THE COURT (FALCONBRIDGE, C.J., STREET, J.) held, affirming the judgment, that the charges of fraud and wrongdoing against defendant Gibson, as architect, were unsupported by the evidence; but, reversing the judgment, that plaintiff was properly discharged by defendant Walter Chandler from the work under the provisions of the contract in question, for the building of a mausoleum. It was plain by the terms of the contract that the architect was the person appointed by the parties to determine whether the work was being satisfactorily proceeded with at the end of 72 hours or not, and that, in the absence of fraud (which was expressly negatived here), his certificate of 4th December, 1899, to Chandler was binding on plaintiff, and a sufficient and complete protection to Chandler in the action he took upon it of discharging plaintiff from the work. Appeal of plaintiff dismissed with costs. Cross-appeal of defendants the Chandlers allowed with costs. Judgment for plaintiff set aside, and action dismissed as against all the defendants with costs.

BOYD, C.

MARCH 6TH, 1903.

CRERAR v. CANADIAN PACIFIC R. W. CO.

Mechanics' Liens—Action to Enforce—Statement of Claim—Affidavit of Verification made by Solicitor as Agent—Indorsement of Address of Plaintiffs—Necessity for—Construction of Rules of Court.

An appeal by plaintiffs from an order of the Judge of the District Court of Rainy River in a mechanics' lien action directing an amendment of the statement of claim, and a cross-appeal by defendants Vigeon Brothers from the same order in so far as it refused to set aside the statement of claim because not verified by affidavit of plaintiffs, and upon another ground which was not pressed.

J. H. Spence, for plaintiffs.

H. L. Drayton, for defendants Vigeon Brothers.

BOYD, C.—Having regard to the canons of construction laid down in *Bickerton v. Dakin*, 20 O. R. 192, 695, and seeing that the object of the legislation has been to simplify the procedure, I think the learned Judge rightly ruled that the affidavit of verification by the solicitor, as agent, was a sufficient compliance with the statute. . . . Forms are not of inflexible use, and if the verification is in the same way and to like effect as in the case of registration, I think there has been “substantial compliance,” to use the phrase found in sec. 19 (1), with the scheme of the Act.

The learned Judge, however, has directed that plaintiff amend the statement of claim by indorsing therein “the particulars of the plaintiffs’ residence as required by the Rules in that behalf.” The ten plaintiffs are day labourers who did work for defendants on the railway in the district of Rainy River, and it is set forth in the statement of claim that they reside in that district. The plaintiffs’ solicitor says in an affidavit that they move about from place to place as they obtain employment, and it is said that defendants were present during the carrying on of the work and have knowledge of who the plaintiffs are, and that the information given as to residence is as much as is practically possible. It is evident that these plaintiffs had no fixed place of abode, to which reference could be made in order to bind them. . . . It is not desirable nor is it needful that all the niceties of practice in due sequence should attach to the summary procedure provided for the realization of workmen’s liens. . . .

In the case of a writ of summons, where the plaintiff sues by solicitor, the writ is to be indorsed with the solicitor’s name and place of business: Rule 134. True it is that by the practice in the High Court and by the incorporation of the form of writ, which is not a part of the Rule, the address of plaintiff himself is also to be given (i.e., his place of residence). But the Rules themselves only require that to be given when plaintiff sues in person: Rule 135. The Rule which applies to this case is Rule 136: “Indorsements similar to those mentioned in the two next preceding Rules shall also be made upon every writ issued and upon every document by which proceedings are commenced in cases where proceedings are commenced otherwise than by writ of summons.” This statement of claim under R. S. O. ch. 153, sec. 31, contains the name and address of the solicitor by whom it is issued and filed, and that meets the legitimate requirements of Rule 136. It was suggested that the address of plaintiffs should be set forth in order to facilitate the obtaining security for costs in a proper case (see Rule 1199), and that is probably the reason why the practice in the High Court has settled into

this form, even when the solicitor acts for the litigant. But, according to the scheme of the Rules, it is from the solicitor whose name is indorsed in the process that the information is to be derived as to the occupation, place of abode (and even street and house number) of the plaintiff in cases where the defendant is at a loss to know his opponent or suspects his absence from the country: see Rule 143. . . . The plaintiffs have a shifting residence, and, as it appears that all are within the limits of the district, I do not think the action should be stayed till more precise local information is given.

I allow the appeal with costs in cause to plaintiffs.

MARCH 6TH, 1903.

DIVISIONAL COURT.

LAWRENCE v. TOWN OF OWEN SOUND.

Water and Watercourses—Municipal Corporation—Damming Stream without By-law—Finding of Liability—Reference as to Damages—Costs up to Hearing—Trespass to Land.

Appeal by defendants from judgment of FERGUSON, J. (1 O. W. R. 559) on the question of costs.

G. F. Shepley, K.C., for defendants.

J. H. Moss, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The action is for damming a stream and thereby diverting its waters upon plaintiff's land and causing him damage. The fact of the diversion of the stream and of damage to plaintiff is shewn, and, by consent, the trial Judge having found that plaintiff was entitled to proceed by action and not for compensation under the Municipal Act, the question of damages was referred to a County Judge. The defendants had paid \$50 into Court by way of amends, and plaintiff had refused to accept the amount in satisfaction of his claim. Defendants contended that the trial Judge, under sec. 470 of the Municipal Act, was bound to reserve the question of costs until the result of the reference should be known, instead of giving plaintiff costs of the action to trial at once. The case does not fall within sec. 470. That section applies only to actions brought to recover damages for alleged negligence on the part of the municipality. Here the municipality acted without a by-law. They had, therefore, no right to do the act complained of, and it was a trespass. It is not for doing a rightful act negligently that the action is brought, but for doing a wrongful act. Appeal dismissed with costs.

MARCH 6TH, 1903.

C. A.

RE LENNOX PROVINCIAL ELECTION.

PERRY v. CARSCALLEN.

Parliamentary Elections—Corrupt Practices—Dismissal of Charges against Respondent and Others—Concurrent Findings of Both Trial Judges—Disagreement of Trial Judges—Right of Appeal to Court of Appeal—Construction of Ontario Election Act and Ontario Controverted Elections Act.

Appeal by petitioners under the Ontario Controverted Elections Act from the judgments of the trial Judges, OSLER and MACLENNAN, JJ.A. (1 O. W. R. 810).

The trial Judges certified that in the result of the trial the petition was dismissed with costs; that they disagreed as to whether the respondent was duly returned or elected, in that they did not agree in a finding upon the charge that the respondent was personally guilty of a corrupt practice in paying money to one F. B. Whisken to induce him to vote for the respondent.

The appellants limited the subject of their appeal to 5 charges, Nos. 22, 52, 43, 29, and 30.

No. 22 was the charge upon which the Judges disagreed.

No. 52 charged the respondent, his financial agent, and other persons with hiring and paying or promising to pay for vehicles to convey voters to and from the polls on election day. The Judges agreed in dismissing it.

No. 43 charged that on the day of the election one James Wilson, an agent of the respondent, paid \$1 to one F. W. Parkinson in order to induce him to vote for the respondent. The Judges agreed in dismissing the charge, but differed as to the grounds.

No. 29 charged that on the day of the election the respondent, his financial agent, and another person, paid a sum of money or other consideration to one R. T. Jones in order to induce him to vote for the respondent. The Judges agreed in dismissing it.

No. 30 charged that on the day of the election the respondent, his financial agent, and another person, paid a sum of money to one John Smith in order to induce him to vote for the respondent. The Judges agreed in dismissing the charge.

The appeal came on for hearing before MOSS, C.J.O., GARROW and MACLAREN, JJ.A., MACMAHON and MEREDITH, JJ.

G. H. Watson, K.C., and Grayson Smith, for petitioners.

W. Cassels, K.C., and E. Bristol, for respondent, objected to the jurisdiction of the Court to entertain the appeal in respect of any of the charges.

Argument was heard on the whole case subject to the objection.

Moss, C.J.O.—The point is taken that the establishment of the charges forming the subject of the appeal involves the disqualification of the respondent and of other persons, and subjects them to disabilities and penalties for corrupt practices, and that a candidate or other person who has not been found guilty of a corrupt practice by the two trial Judges has at least two shields against an appeal to this Court.

By sec. 57 (6) of the Controverted Elections Act it is enacted that there shall be no appeal from a decision of the Judges finding that a candidate or other person has not been guilty of corrupt practices. By the other it is enacted that no candidate or other person is to be disqualified or subject to any disability or penalty for any corrupt practice or alleged corrupt practice without the concurrent judgment to that effect of the two Judges by whom the election petition is tried.

The appellants scarcely contended that if the trial Judges had agreed in their finding in respect of all the charges an appeal could nevertheless be entertained. . . . But the argument is, that the trial Judges having disagreed in respect of at least one charge, there is no decision as regards it, and an appeal in such cases is expressly provided for by sec. 56 of the Controverted Elections Act, so that there is certainly jurisdiction to entertain an appeal on that charge, and, there being jurisdiction to that extent, the whole case is open under secs. 66, 67, 68, and 69 of the Controverted Elections Act, unless the appellants choose to limit the appeal as provided in sec. 67. . . .

Assuming that a disagreement is not to be considered a decision of the Judges, their concurrent judgment is most certainly a decision; and when there is such a decision finding a candidate or other person not guilty of corrupt practices, there is nothing in the legislation to enable the Court of Appeal to sit in judgment upon that decision in the face of sec. 57 (6) of the Controverted Elections Act.

Section 66, enabling a party who is dissatisfied with the decision of the Judges on any question of law or fact to appeal against the same, must be read in connection with sec. 57 (6), which it was not contended to override. In fact, as appears from the history of the legislation, sec. 57 (6) is the

later enactment, and was added to the law while sec. 66 was in force, and if there is an inconsistency the latter must give way: *Dean of Ely v. Bliss*, 5 Beav. 574, 584. Sections 66 and 67 prescribe the procedure to be adopted where a right of appeal exists; they do not touch the right itself. And so with the next succeeding sections. They deal with the power of the Court in a case properly before it. I think it is clear that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges in which otherwise there is no appeal.

The question remains whether in respect of a charge of corrupt practices as to which the Judges have disagreed there is a right of appeal.

The legislation bearing on this question is in a state of confusion owing largely, if not entirely, to the changes introduced by 47 Vict. ch. 4, and to the manner in which some of its provisions were dealt with in the subsequent revisions of the statutes.

There are portions of the Ontario Controverted Elections Act (e.g., secs. 56 and 57 (2)) which, standing alone, would seem to confer a general right of appeal in cases of disagreement between the Judges. But they must be read not only with the other provisions of the same Act, but also with the provisions of the Election Act which are in *pari materia*.

The language of sub-sec. (5) of sec. 57 is very wide. It provides that if the Judges differ as to any matter on which under secs. 172 and 174 of the Ontario Election Act *or otherwise* any disqualification, disability, or liability to a penalty, depends, they shall certify such difference, and the candidate shall not be disqualified or subject to a disability or penalty. In this sub-section the words "subject to appeal," which are found in sub-secs. (2) and (3), do not occur—a plain intimation that, in the cases therein provided for, there is to be no appeal. What are the cases? Sections 172 and 174 are the provisions of the Election Act which under certain circumstances operate the one to save the election and the other to relieve the candidate from disqualification, disability, or penalty.

As to cases within these sections, there is no appeal from a disagreement. Then what is the force of the words "*or otherwise*" if not to extend the same effect to a difference or disagreement in every matter on which a candidate might be disqualified for a corrupt practice?

This sub-section covers the case of a candidate, but does not extend to others. But sub-sec. (6) deals with the cases of both candidates and others.

Section 171 (2) is still wider and more comprehensive. While it does not in terms exclude an appeal, it is apparent that in the case of a disagreement between the trial Judges a judgment in appeal finding a candidate or other person guilty of corrupt practices must subject him to disqualification or other disability or penalty without the concurrent judgment to that effect to the two trial Judges.

It is argued that the finding of the Court of Appeal does not necessarily lead to disqualification, disability, or penalty; that the finding is merely a judgment upon the charge of corrupt practices, involving, it may be, the avoidance of the election, but not the infliction of the punishment upon the guilty parties; in other words, that the finding of the Court may avoid the election under sec. 171 (1), but not disqualify under sec. 173. This apparently anomalous result may happen where sec. 174 can be applied. But there is nothing on which to base a like result where the circumstances do not warrant the application of that section. And it must be borne in mind that the provisions of sec. 171 (2) are expressly made to apply to 171 (1) and to the conditions and circumstances therein mentioned as well as to other matters on which corrupt practices or the consequences thereof in any way depend. So that the concurrent judgment of the two trial Judges must be present, not only for the purposes of disqualification, disability, or penalty, but for the purposes of avoiding the election for corrupt practices.

It is not unlikely that . . . sub-sec. (2) of sec. 171 was misplaced in the revision of the statutes, but we must now take it where it is found and apply it as directed.

Section 57 of the Controverted Elections Act, and sec. 172 (2) of the Ontario Election Act had their origin in 47 Vict. ch. 4, known as the Election Law Amendment Act, 1884. As the law stood when it was passed, allegations of corrupt practices against a candidate or his agents were required to be tried by two of the Judges of the rota sitting together, and no candidate was to be unseated for corrupt practices, nor was any person to be declared guilty of a corrupt practice, except upon the decision of the two Judges jointly or of the Court of Appeal: R. S. O. 1877 ch. 11, sec. 38. So that the Legislature at that time contemplated an appeal even in the case of a concurrent judgment.

The effect of 47 Vict. ch. 4 is now to be considered. In sec. 10 the provisions which are now sec. 57 of the Controverted Elections Act were for the first time enacted, and thereby appeals were limited to a considerable extent. By sec. 33, sec. 38 of R. S. O. 1877 ch. 11 was amended so as

to provide that no person should be declared guilty of a corrupt practice or *disqualified* except upon the decision of the two Judges jointly or by the Court of Appeal. Having regard to sub-sec. (6) of sec. 10, the last six words must have been retained through inadvertence, for sub-sec. (6) declared that there should be no appeal from a decision of the Judges finding a candidate or other person not guilty of corrupt practices.

Then came sec. 48, enacting amongst other things that "to remove doubts it is declared that it has been and is the policy of the election law and the intention and meaning of the several statutes in that behalf that . . . no candidate or other person is disqualified or subject to any disability or penalty for any corrupt practice or an alleged corrupt practice without the concurrent judgment to that effect of the two Judges by whom the election petition is tried." (See *South Renfrew Case*, 1 Ont. Elec. Cas. 70, 85, 372).

Section 48 further declared that "this applies to sec. 162 of the Election Act and the conditions and circumstances therein mentioned as well as to other matters on which corrupt practices or the consequences thereof depend." Section 162 was at that date the exculpatory clause . . .

And lastly, sec. 48 further declared that in case of an election being set aside and a new one had to the same Legislative Assembly or otherwise, the new election could not be avoided by setting up corrupt acts or practices by the candidate in or during the former election, or affecting the same, which were not set up and proved at the former trial, and so adjudged by the two Judges at the former trial or by the Court of Appeal before the subsequent election as by law to involve such disqualification, disability, or penalty. . . .

These inconsistent and conflicting provisions were made no plainer by the declarations in sec. 18 of 48 Vict. ch. 2, passed in 1885, but omitted, along with all the succeeding sections of that Act, from the Revised Statutes of 1887, and never since re-elected.

Section 48 of 47 Vict. ch. 4 was also omitted from the revision of 1887. It is not necessary to consider in what condition its omission left the law, for in 1895 it was restored to the statute book by sec. 18 of 58 Vict. ch. 4, which in part enacted that "notwithstanding the omission of section 48 of chapter 4. from the Revised Statutes of Ontario 1887, such section is now and has been in force from the time of the passing thereof." This enactment was passed without noticing apparently that in the meantime sec. 162 of the Election Act, to which sec. 48 referred, had become sec. 165, and sec. 158

had become sec. 162, of R. S. O. 1887 ch. 9. In the revision of 1897 sec. 162 became sec. 171 (1), and sec. 165 became sec. 174, and, properly speaking, the part of the revived sec. 48 which referred to sec. 162, ought to have been attached to sec. 174, but, instead, it was made sec. 171 (2), and was made to refer to sec. 171 (1). The effect is, as before pointed out, that its provisions are expressly made to apply not only to cases of disqualification, disability, and penalty, but also to cases of avoidance of the election for corrupt practices, and it follows that a judgment of the Court of Appeal in a case of disagreement of the Judges on a question of corrupt practice, holding the corrupt practice proven, would bring about a result which the Election Act says shall not be without the concurrent judgment of the two trial Judges.

It may be conjectured that the provisions of sec. 171 (2) were intended to apply only to the trial, and were not intended to touch the proceedings in appeal. But the intention is not so clearly expressed as to enable us to give it that effect, or to hold, in face of the plain language of that sub-section and of sub-secs. (5) and (6) of sec. 57 of the Controverted Elections Act, that the Court has jurisdiction, upon an appeal against a candidate or other person charged with corrupt practices, to render a decision not arrived at by the joint judgment of the trial Judges.

Although there are to be found in various sections of the legislation references pointing to an appeal in case of disagreement in charges of corrupt practices, they are not sufficiently clear or definite to overcome the distinct declarations of the other sections. Therefore, from the cases of disagreement in which an appeal is provided for there must be excepted the cases involving charges of corrupt practices.

The result is, that in this case the appeal does not lie in respect of any of the charges, and it must be dismissed. The costs will follow the result.

GARROW, J.A., gave reasons in writing for the same conclusion, in which MACMAHON, J., concurred.

MEREDITH, J., also gave reasons in writing for the same conclusion.

MACLAREN, J.A., gave reasons in writing for agreeing in the conclusion as to cases of corrupt practices which the trial Judges agreed in dismissing; but dissented as regards cases in which the trial Judges disagreed.

MARCH 6TH, 1903.

C. A.

RE SOUTH OXFORD PROVINCIAL ELECTION.

PATIENCE v. SUTHERLAND.

Parliamentary Elections—Corrupt Practices—Disagreement of Trial Judges as to Charges against Respondent and Another—Right of Appeal to Court of Appeal—Construction of Ontario Election Act and Ontario Controverted Elections Act—Hiring Vehicles—Evidence.

Appeal by petitioners and cross-appeal by the respondent, under the Ontario Controverted Elections Act, from the judgments of the trial Judges, STREET and BRITTON, JJ. (1 O. W. R. 795).

The appeal of the petitioners was in respect of two charges of corrupt practices upon which the trial Judges disagreed and certified their disagreement. One charge was a personal one against the respondent, the other a charge against an agent.

The respondent's cross-appeal was from the finding of the trial Judges that two charges of hiring vehicles for the purpose of conveying voters on election day were proved, viz., hiring from one Skinner and hiring from one Walker.

The appeal and cross-appeal were heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

G. H. Watson, K.C., for the petitioners.

S. H. Blake, K.C., and E. Bristol, for the respondent.

The same objection to the jurisdiction of the Court to hear the petitioners' appeal was urged as in the Lennox case, ante.

MOSS, C.J.O.—For the reasons which I have endeavoured to state in the Lennox case (ante), I think there is no jurisdiction to entertain the petitioners' appeal and it must be dismissed with costs.

The cross-appeal remains to be disposed of. . . . As to the Skinner charge, there was a conflict of testimony between Skinner and the respondent's agent J. W. Patterson. The former deposed that in the conversation between Patterson and him with reference to furnishing the vehicles he told Patterson that the charge would be \$5 each for the double rigs and \$2.50 for the single, and that the latter said nothing—"he made no kick." On the other hand, Patterson deposed that he told Skinner that there was no pay in this.

and that this was agreed to. Neither of the trial Judges accepts this statement. Street, J., said that he did not either credit the statement that \$5 was promised to Skinner or that there was any arrangement that he should not be paid at all. . . . Although there be no payment or no express promise to pay, there may yet be a hiring, and whether or not there was such hiring depends upon the circumstances and what took place between the parties. Skinner being a liveryman, whose business it is to hire vehicles for reward, the fact of his furnishing vehicles at Patterson's request would raise an inference, in the absence of anything to displace it, that they were to be paid for. And, in my opinion, the evidence fails to raise the contrary inference. Skinner's acts and conduct at the time and afterwards were consistent with his testimony. He charged the vehicles in his pass-book, at the prices he said he spoke of, against Mr. J. L. Patterson, whom he knew to be the respondent's financial agent, and he afterwards rendered him an account for them. He furnished vehicles for the same purpose to the agent of Dr. McKay, the opposing candidate, and charged and was paid for them. He was subjected to a searching cross-examination, but on the whole he adhered to his account of what had occurred between him and J. W. Patterson, and on the crucial point of his being told there was to be no pay, the trial Judges have accepted his statement and have rejected Patterson's. I am unable to say that they were wrong, and I think their conclusion should be upheld.

But as regards the Walker charge, I think upon the evidence that the inference of hiring was rebutted. There was no substantial conflict of testimony between Walker and J. W. Patterson as to what occurred between them. It is true that in one place Walker says he expected to get paid some time, but that was only his own expectation. The question is, whether, in view of what actually took place, he could recover pay for them. The result of the evidence appears to me to be that he was willing to let the vehicles go without pay, that he in effect volunteered them, and that they were furnished on these terms; and I think this charge ought to have been dismissed.

The result is that the cross-appeal fails as to one charge and succeeds as to the other. Success being divided, there will be no costs of the cross-appeal.

OSLER, J.A., gave reasons in writing for coming to the conclusion that the petitioners' appeal did not lie. He expressed the opinion, however, that the disposition which Street, J., would have made of both the charges as to which

the trial Judges disagreed was that which commended itself as the proper one in a case of this kind.

On the Skinner and Walker charges OSLER, J.A., agreed with the views expressed by Moss, C.J.O.

MACLENNAN and GARROW, JJ.A., orally concurred.

MACLAREN, J.A., dissented to the same extent as in the Lennox case, ante.

MARCH 6TH, 1903.

C.A.

RE TOWNSHIP OF ELMA AND TOWNSHIP OF WALLACE.

Municipal Corporations—Drainage—Assessment of Lands in Adjoining Township—Outlet or Injuring Liability.

An appeal by the corporation of the township of Elma from the judgment or decision of the Referee under the Drainage Act upon an appeal to him by the corporation of the township of Wallace from the report of John Roger, an engineer appointed by Elma to make an examination and report in respect of a scheme of drainage petitioned for by certain land-owners in the township.

The engineer by his report fixed the entire cost of the whole work at \$21,117.42, and assessed roads and lands in Wallace for \$2,717.92.

On appeal by Wallace to the Referee he determined that the roads and lands in that township were not liable to contribute to the drainage works in question, and ordered that the assessments made on such roads and lands be set aside, and that the drainage work proposed and provided for in the report be not proceeded with by Elma at the expense of Wallace.

The grounds taken by Wallace were, that the scheme of drainage work in question was unnecessary so far as Wallace was concerned, and was not a benefit; that to be effectual it should provide for a better outlet by improving the north branch of the Maitland river, flowing south-west from Listowel; that it did not provide a sufficient outlet; that the proportion assessed against Wallace was unjust, unequal, and excessive; and that the petition and preliminary proceedings were insufficient to warrant the action taken by Elma and to warrant the report.

At the hearing before the Referee it was agreed that the inquiry should be restricted for the present to the question

of the engineering feasibility of the drainage work, and the legality of the scheme, leaving the adjustment of the assessment and any other questions to be dealt with at a later date in case the report was upheld as against the principal objections.

The question of law for decision was, whether the roads and lands in Wallace were assessable either for outlet or injuring liability. There was no assessment for benefit, and it was not asserted that any benefit could be derived by Wallace.

The Referee held that the roads and lands in Wallace could not be legally assessed either for injuring or outlet liability.

A. B. Aylesworth, K.C., and H. B. Morphy, Listowel, for appellants.

D. Guthrie, K.C., and J. P. Mabee, K.C., for corporation of Wallace.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—I am of opinion that the Referee's conclusion is right and that his decision should be affirmed.

No part of the drainage work is in the township of Wallace. The nearest point of the work in question is nine miles from the boundary of Wallace, and there is a fall of 79 feet from Wallace to the nearest point of the work. The evidence shews that there is an extensive area between these points through which the flow of the north branch is to go on as before. This part of the stream is not touched by the drainage scheme. None of the proposed work is to be done upon it. It has not been the subject of improvement or change under any drainage scheme. It is a natural water-course flowing through and from Wallace, and carrying with it in its ordinary flow the waters which it collects in its course through Wallace. Before these waters reach the boundary of Wallace they have been collected and gathered in the stream in consequence of the elevation and trend of the lands leading the surface flow to it.

Owners of lands have drained them by means of tile and other under drains, as well as by surface drains, and the waters thus collected find their way to the stream. This is a right which as land-owners they may lawfully exercise, and while they do so reasonably they are not subject to prevention or interference from others down the stream: *Rawstron v. Taylor*, 11 Ex. 369-383; *Angell on Watercourses*, secs. 108 (a) to 108 (s); *Waffle v. New York Central R. W. Co.*, 58 N. Y. 11; *Foot v. Bronson*, 4 Lans. 47.

There is no artificial work connecting these waters or the stream through which they flow with the proposed drainage works. Their flow from Wallace is not thereby facilitated or impeded. The township of Wallace needed no outlet superior to that which nature provided, and none is supplied by these works. And no artificial works having been introduced which have had the effect of bringing the flow upon the lands below, the claim for injuring liability cannot be sustained.

The appeal should be dismissed with costs.

MARCH 6TH, 1903.

C.A.

RE TOWNSHIP OF CAMDEN AND TOWN OF DRESDEN.

Municipal Corporations—Drainage—Culvert in Highway of Town—Part of Existing Drain—Reconstruction—Cost of, hoc Borne.

Appeal by the corporation of the township of Camden from the judgment or decision of the Drainage Referee dismissing an appeal from the report of an engineer under the Drainage Act.

M. Wilson, K.C., for appellants.

D. L. McCarthy, for respondents, the corporation of the town of Dresden.

The judgment of the Court (MOSS, C.J.O., OSLER, and MACLAREN, J.A.) was delivered by

OSLER, J.A.—I am of opinion that the appeal should be dismissed.

The culvert across the street in the town of Dresden the renewal or reconstruction of which the report in question recommends was in fact a part of the existing drainage work known as the Stephens or Henson drain. It had been adopted as the outlet for that drain, which could not lawfully have been done on any other footing or for any other reason than as being part of Camden's drainage scheme as established by that work. Dresden was not obliged to receive or admit within its municipal boundaries the waters brought down out of Camden by the Henson drain, unless they were brought there under the authority of some lawful proceeding under the Drainage Act, as Camden had no right to discharge its waters into or upon the road of Dresden without providing an outlet therefor. The ultimate outlet was the Sydenham river, which these waters would not reach without making use of the culvert or of some other passage across

the road as part of the drainage scheme and work, and Camden adopted Dresden's culvert for that purpose.

I do not think it matters (even were it really the case) that none of the money raised for the construction of the original work was expended on the culvert. Used as it was, if it became out of repair by reason of the discharge of Camden's waters, or if it does not now act as a proper and sufficient outlet therefor to the river, it was within the jurisdiction of the engineer to report, as he has done, a scheme for its repair and improvement, the principal cost of which ought justly to be borne by Camden.

I agree, therefore, with the Drainage Referee that the culvert is a part of the entire drainage work, and that Camden cannot successfully contend that it is merely part of Dresden's highway, the cost of the maintenance and repair of which should be borne by that municipality.

Appeal dismissed with costs.

MARCH 6TH, 1903.

C.A.

BURNETT v. NOTT.

Fraud and Misrepresentation—Sale of Shares—Action for Deceit—Knowledge of Defendant—Reliance of Plaintiff on Statements.

This was an action of deceit in which the defendant was charged with making certain representations to the plaintiff in order to induce him to subscribe for shares in the capital stock of the Co-operative Cycle and Motor Company, Limited, and to pay therefor the sum of \$1,000.

The defendant appealed from the judgment of MEREDITH. J., delivered after trial without a jury, finding the defendant liable and awarding the plaintiff \$1,000 damages.

G. H. Watson, K.C., and S. C. Smoke, for appellant.

A. B. Aylesworth, K.C., and E. A. Lancaster, St. Catharines, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—The plaintiff charged that in order to induce him to subscribe and pay for the shares the defendant falsely and fraudulently represented to the plaintiff that the investment in such shares was a first-rate investment, and sure to pay good dividends, that a dividend of 7 per cent. at least was secured to the shareholders, that the company was sure to prosper and the shareholders were sure of good profits,

and that the company's financial position was very strong. Plaintiff further charged that at the time of making these representations the defendant produced and delivered to the plaintiff a statement in writing which the defendant represented was a true and correct statement of the affairs of the company, and which stated that there was a surplus of assets over liabilities of \$51,933.66, and shewed that the actual surplus, without taking into account as assets anything for moneys to be paid by shareholders for stock, was at least \$56,500. Plaintiff further charged that these representations were false to defendant's knowledge, and that the plaintiff, relying upon them, was induced to subscribe for 20 shares of the company's stock and to pay therefor the sum of \$1,000, that the company had soon thereafter gone into liquidation, and that the shares were worthless.

The defence was a denial of the charges. .

The learned trial Judge found that, before the plaintiff subscribed for the shares, and in order to induce him to do so, the defendant represented to him (1) that the company had received more orders for bicycles than they were able to fill, (2) that the plaintiff would have permanent employment in the company's business, (3) that the company had a surplus of \$51,000 of assets over liabilities, and (4) that the plaintiff would have 7 per cent. interest secured to him upon the investment.

He further found that these representations were untrue. to the defendant's knowledge, and that the plaintiff acted upon them in subscribing and paying for the shares.

The statement of claim did not specify the first of these representations, but the plaintiff's evidence with regard to it was given without objection, and the defendant was examined with reference to it. The significance of its omission from the statement of claim was properly made the subject of comment as bearing upon the general truthfulness of the plaintiff's statements as to what occurred between him and the defendant on the occasion when the representations were alleged to have been made. But, judging between the testimony of the two parties and having regard to the circumstances disclosed in the other evidence, there is no reason for differing from the learned trial Judge's estimate of the plaintiff's testimony.

The evidence supports the learned Judge's findings of fact with regard to all the representations, but the plaintiff needs only to rely upon the representation that the company had a surplus of \$51,000 assets over liabilities. This representation, which was made by the production to the plaintiff of a statement in writing purporting to shew a surplus of

\$51,933.66, backed by the oral assurances of the defendant that the statement was correct and true, is sufficient in itself to sustain the judgment. That it was a statement of a material fact goes almost without saying. And, as the learned trial Judge observed, it is difficult to suppose that it could have been honestly made. The defendant's attempted explanation of the presence of \$51,993.66 in the statement, where at most no more than \$5,000 should have been shewn, is very unsatisfactory, and leads to the conviction that he knowingly used the larger sum in order to lead to the impression which the plaintiff gained that the business was so prosperous that the shareholders had assets of the value of \$51,993.66 over and above all liabilities, in addition to their subscribed shares in the capital stock of the company.

The defendant admitted at the trial that the amount of surplus was wrongly stated, and that at most it should not have exceeded \$6,000.

The item of "Bicycles shipped to date 1,200 at \$35" was calculated to produce, and in fact did produce the impression on the plaintiff's mind that so many bicycles had been sold at that price, whereas in fact they had only been sent to various agencies and were in stock and unsold. The defendant endeavoured to justify this by saying that he explained to the plaintiff the system on which this business was being done. But this is wholly inconsistent with his positive and reiterated assertion that on the occasion of the interview at which the plaintiff subscribed for the shares, the statement was not before them, and was not gone over, and that he never gave it to the plaintiff or explained it to him at any time, and is quite opposed to the other testimony.

The item of amount of notes on hand for stock subscribed in the statement, should not have appeared on the list of assets, or, if inserted, should have been offset by the shares represented by the notes, and the defendant was well aware of this. And his testimony shews that he knew quite well that there was no such surplus as the statement shewed.

The plaintiff was unversed in business affairs, and was not assisted by Mr. Varley, who did not assume to act as his solicitor or to advise him in the transaction. His testimony is that he went to the Co-operative Cycle and Motor Company's establishment only for the purpose of seeing about securing employment, that the matter of subscribing for shares had not been mentioned to him, and that it was first spoken of by the defendant. In this he is not contradicted, although it would appear that before the interview Mr. Varley and the defendant had been in communication about the plaintiff, and the statement in question had been prepared

at the suggestion of Mr. Varley in anticipation of an interview.

The plaintiff relied upon the statement and the representations of the defendant in regard to it, and was induced thereby to subscribe and pay for the shares.

The judgment should be affirmed with costs.

MARCH 6TH, 1903.

C.A.

McCAUGHERTY v. GUTTA PERCHA AND RUBBER CO.

Master and Servant—Injury to Servant—Dangerous Machinery—Findings of Jury—Want of Guard—Opinion Evidence—Withdrawal from Jury—Defect in Way—Unevenness of Floor—Workmen's Compensation Act.

Appeal by defendants from judgment of STREET, J., upon the findings of the jury, in an action tried at Toronto, in favour of plaintiff for \$2,000 damages.

The plaintiff, a lad of 16, was hired by defendants in April, 1900, as a workman in their rubber goods factory, to assist the other workmen in the mill room, a large room in which were placed a number of machines called calenders. These were heavy, fixed machines, made up of a series of rollers 42 inches long and 18 inches in diameter, revolving on each other in a heavy iron frame, and through and over these rollers the rubber passes in the process of manufacture. In part of the machine a workman is placed armed with a knife, whose duty it is to prick air bubbles and remove dirt or other foreign material as it appears on the face of the rollers as they revolve. Each roller makes about seven revolutions a minute. The frame or bed plate of one of these machines was about 9 inches wide, and was elevated above the surface of the floor in front of the machine by from half to three-quarters of an inch. The distance out from the rollers themselves was 15 inches. It was customary in defendants' factory for the workmen to sit in front of the machine while engaged in watching the rollers, and this was to the knowledge of and without objection by defendants' foreman in charge. No fixed or permanent seats were supplied, but small wooden packing boxes of about 12 inches by 20 were used; and on such a box, resting on the iron bed plate of the machine described, plaintiff was sitting when he was injured. A fellow-workman, who had been engaged in watching the rollers, desired to leave a few minutes before closing time, and requested plaintiff to take his place, which plaintiff did. He sat down upon the box and commenced

operations, but within a few minutes he slipped forward, owing, as he said, to the box slipping on the smooth iron surface of the bed-plate, and his hands were caught between the rollers, which were exposed and unguarded, and he lost his left hand and all the fingers of his right hand.

He alleged a cause of action at common law, under the Factories Act, and under the Workmen's Compensation Act.

At the trial the only expert witness examined on behalf of plaintiff was one McLennan, a journeyman machinist, with no experience in the use or manufacture of calenders, who pronounced the machine dangerous and propounded a guard as a protection.

The defendants called seven experts who concurred in stating that the machine in question was of the usual kind, and that in no case had any of them ever seen a machine of the kind with a guard, and there was a practical concurrence among them that a guard was not necessary, and that it would seriously interfere with the ordinary use of the machine.

There was no evidence that any accident had ever before happened from the use of this form of machine which would have been prevented by the presence of a guard.

The following were the questions put to the jury and their answers:

1. Was plaintiff obeying the general orders given him by the foreman in working at this machine? Yes. 2. Was the machine a dangerous machine, assuming ordinary precaution on the part of the operator? Yes. 3. Were the rollers securely guarded so far as practicable, taking into consideration the use to which the machine was intended to be put? No. 4. Was the accident to plaintiff due to any defect in the condition or arrangement of the works of defendants? Yes. 5. If so, what was such defect? Ans.—Want of proper seat, lack of guard, unevenness of the floor. 6. Could plaintiff, by the exercise of ordinary care, have avoided the accident? No. 7. Did defendants use reasonable care to furnish proper means of working at the machine so as to protect their servants working upon it against unnecessary risks? No: in that they did not provide a seat for operator, and did not guard the roll. The damages were assessed at \$2,000.

S. H. Blake, K.C., and R. H. Greer, for appellants.

W. Nesbitt, K.C., and R. McKay, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.) was delivered by

GARROW, J.A.—Defendants urge that there was no evidence of negligence proper to submit to the jury, or that in

any event the verdict is contrary to the weight of evidence, and rely very strongly on the rule acted on in *Jackson v. Grand Trunk R. W. Co.*, 2 O. L. R. 689, since affirmed by the Supreme Court—which, after all, was not new, but an application to the facts in that case of the old and well known rule that it is always for the Judge to determine at the close of the case, as matter of law, whether there are any facts proved or evidence given from which the jury, acting reasonably, can infer negligence. If, in his opinion, there is no such proof, his duty, as I understand it, is to withdraw the case from the jury and deal with it himself.

In so far as the question of a guard is concerned, this case seems to me to have been an eminently proper one for the application of the same rule. There were, I think, at the close of the case, no facts in evidence from which a jury, acting reasonably, could infer negligence by reason of defendants' failure to guard. Indeed, it is to me a matter of very considerable doubt whether the witness McLennan was examinable at all as an expert and entitled to give his opinion in that character. Opinion evidence in this connection is only admissible "whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance:" 1 Sm. L. C., 10th ed., p. 491. But this witness frankly admits his absolute ignorance of such machines as that in question, although he had some knowledge of machinery in a general way. But, whether strictly an expert or not, it is beyond question that the evidence given by defendants on this subject completely overwhelmed what little had been stated by McLennan. . . . The master is not an insurer, but is only bound to the exercise of reasonable care, and, in my opinion, he has acquitted himself of his duty in this respect by supplying machines of a common and usual type, such as factories in the same business generally use. . . .

There remains for consideration the serious question of what I regard as the real cause of the injury, the unevenness of the floor directly in front of the machine, at the very spot where the workman, whether he stands or sits, must always be to do his work. The machine itself may not be in itself necessarily what is known as a dangerous one. . . . It is obviously important that the ways and approaches to such a machine should be reasonably free from all unnecessary obstacles likely to cause slips or stumblings of any kind. There was no necessity for the unevenness of the floor, in the requirements of the machinery, or at least none was proved. . . . A fixed seat would not have been possible, as the evidence shews, but a four-legged removable stool to rest on

each side of the band, or, better still, the levelling of the floor up to the band, would have, I think, prevented this accident. . . .

I think the cause of action is established within the provisions of sub-sec. 1 of sec. 3 of the Workmen's Compensation Act; that this branch of the case was amply supported by evidence, and could not have been withdrawn from the jury; and that the appeal must, therefore, be dismissed.

But, as the maximum sum recoverable under the Act is \$1,500, the judgment must be reduced to that sum and costs of the action; and there should be no costs of this appeal.

MARCH 6TH, 1903.

C.A.

MUNRO v. TORONTO R. W. CO.

Partition—Parties—Lease by Infant Tenant in Common—Repudiation—Partition by Deed among Tenants in Common—Position of Lessees.

Appeal by defendants from order of a Divisional Court (4 O. L. R. 36, 1 O. W. R. 316) reversing the judgment of MEREDITH, C.J., at the trial (1 O. W. R. 25), in an action for possession of land, a partition, and other relief.

Plaintiff, while an infant, joined with an adult brother and sister in a lease of a property to the east of the city of Toronto, known as Munro Park, in which all three were tenants in common, for a period of ten years, to the defendants, who turned the property into a pleasure ground. Plaintiff came of age during the term, and at once repudiated the lease, and effected with his co-tenants a partition of the property, to which defendants were not parties. The Divisional Court held that the partition made could not be declared binding on the defendants, and that plaintiff's brother and sister were not necessary parties to a new partition between plaintiff and defendants, and ordered a partition for the rest of the term, and also allowed plaintiff mesne profits.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

J. Bicknell, K.C., for appellants.

C. Millar, for plaintiff.

Moss, C.J.O.—The plaintiff has already made partition with his brother and sister, and as against them he needs no order of the Court to perfect his title to the centre parcel which has been conveyed to him in severalty. As respects

defendants, his claim to partition rests upon the ground that they and he are tenants in common of the parcel for the remainder of the term of the lease under which defendants hold.

The plaintiff refused to be bound by the lease, and if, instead of making partition by agreement and conveyance between himself and his brother and sister, to which defendants were not parties, he had come to the Court for partition, making defendants parties, he would have had no difficulty in obtaining a partition in severalty, and confining defendants' lease to the parcels allotted to his brother and sister. The position of the defendants would then have been that in place of being tenants of two undivided shares they would become the tenants of two divided shares. See *Mason v. Keays*, 78 L. T. R. 33. . . .

But when plaintiff chose to make partition without reference to the defendants, what is the effect as regards their respective interests?

If the partition was binding upon defendants, their tenancy under their lease would be restricted to the parcels allotted and conveyed to plaintiff's brother and sister, and plaintiff would hold his parcel free from the lease. . . .

Unless the effect of the language of the lease is to give to defendants a greater estate than they had before the conveyance by way of partition, they are only entitled to a leasehold interest in an undivided two-thirds of the whole land. And is not this the position in which plaintiff should be entitled to place them, they having declined to be bound by the partition unless on terms of plaintiff recognizing the lease as subsisting over his interest? Ought they to be permitted to claim as against him that the partition is binding on him, and that they are entitled to the benefit of the conveyance so far as it conveys to plaintiff's brother and sister? Or should they not be held obliged either to accept or reject it as a whole? . . . Unless defendants can insist on the conveyance, the plaintiff is entitled to a partition of the whole premises so as to set apart in severalty the two-thirds portion of the whole which the defendants may hold during the remainder of the term of their lease. And in order to accomplish this his brother and sister must be before the Court. . . . In my opinion, they are necessary parties at some stage of the proceedings, and I think that, under the circumstances of this case, they should be made parties before judgment is pronounced. If there had been no conveyance between the co-tenants, and the plaintiff sought partition, the brother and sister would be necessary parties, and in the way in which the case is now to be looked at, and indeed in the

way in which the Divisional Court regarded it, the proceedings should be allowed to go on as if the plaintiff's rights were unaffected by the conveyance. And any order that may be necessary to put the matter in train for bringing about this result should be made.

On other grounds also, plaintiff's brother and sister appear to be necessary parties at some stage of the case.

The effect of a partition on a conveyance is to sever the reversion. The plaintiff's brother and sister then have each a reversion in severalty, and each should become entitled to an aliquot part of the rent issuing out of the parcel which he or she holds. And such remedies as they would have against the land under the lease, such, for example, as the right of re-entry for non-payment of rent, would be exercisable in severalty and not otherwise: R. S. O. ch. 170, sec. 9.

The plaintiff's brother and sister are entitled to be present and have a voice in the partition proceedings which will fix the parcels out of which they are to receive their portions of the rent, and will relieve another parcel entirely from all claim by them under the lease. It is certainly most desirable and convenient that they should be parties when these proceedings are taken.

Mason v. Keays (*supra*), Mildmay v. Quicke, L. R. 20 Eq. 537. Foster on Joint Ownership, p. 124, Baring v. Nash, 1 V. & B. 551, referred to.

Appeal allowed and judgment of MEREDITH, C.J., restored.

The defendants are entitled to the costs of the motion to the Divisional Court and of the appeal.

The plaintiff is to have one month within which to add parties and amend in accordance with the judgment of Meredith, C.J.

GARROW, J.A., gave written reasons for coming to the same conclusion.

OSLER and MACLAREN, JJ.A., concurred orally.

MACLENNAN, J.A., dissented, giving reasons in writing.

MARCH 6TH, 1903.

C.A.

ST. THOMAS GAS CO. v. DONLEY.

Contract—Supply of Light to Building—Rate of Payment—Expiry of Contract—Continuance of Supply—Letter Stating New Terms—Acquiescence.

Appeal by plaintiffs from order of MEREDITH, C.J., dismissing plaintiffs' appeal from the report of a local Master.

A. B. Aylesworth, K.C., and J. Farley, K.C., for appellants.

T. W. Crothers, St. Thomas, and A. Grant, St. Thomas, for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

OSLER, J.A.—The Master's finding cannot be said to rest upon the credit he has attached to any particular witness. He did not accept the evidence of defendant as establishing the agreement attempted to be set up by him as the result of his interview with the president of plaintiff company on 31st October or 1st November, nor did he accept the evidence of the latter as contradicting it. The question of liability was, therefore, at large, and rested upon the inferences which ought to have been drawn from the president's letter to defendant of 15th October, 1901, and the subsequent acts and conduct of the parties. Defendant used the electric light supplied by plaintiffs to his hotel, and they are entitled to be paid for it. The Master has held that the amount recoverable was to be ascertained as upon a quantum meruit, and, in the absence of any other evidence than the fact of user, it might not have been unreasonable to measure it by the rate of payment under the two years' contract which expired on the 1st November, 1901, and the Master in fact awarded a trifle more than this. Defendant had, however, neglected or refused to exercise the option of renewing his contract, and plaintiffs had given him notice in writing before he entered upon another year that they would thereafter charge him upon a meter measurement at the rate of 9 cents per thousand. This letter was never withdrawn, and the Master did not accept the defendant's statement of what occurred at the subsequent interview between him and the president. . . . Defendant thereafter continued to use the light supplied by plaintiffs throughout the hotel during the whole month of November. At the end of that month an account was rendered to him by plaintiffs in which he was charged upon the meter measurement and at the rate of 9 cents per thousand. He made no remonstrance, although he cut off the light from the upper part of his hotel . . . but continued to use the light in the rest of the hotel until the middle of December, when . . . he severed the plaintiffs' wires altogether and cut out their meter. It was proved that the rate charged by plaintiffs was a reasonable one, though larger than . . . defendant had been paying. I am . . . unable to see why this ought not to be regarded as the basis of liability. Having had notice before he began to use the light of what plaintiffs

meant to charge therefor, and having used it thereafter, . . . the onus rested upon him to establish clearly that plaintiffs had withdrawn the letter and left the rate open for subsequent arrangement. . . .

The appeal should be allowed with costs and judgment entered for plaintiffs for the amount payable on the footing I have mentioned.

MARCH 6TH, 1903.

C.A.

DOHERTY v. MILLERS AND MANUFACTURERS INS.
CO.

Fire Insurance—Mutual Plan—Annual Renewal—Proposal for Increased Premium — Non-acceptance — Condition of Payment in Advance.

Appeal by plaintiffs from judgment of STREET, J. (4 O. L. R. 303, 1 O. W. R. 457), dismissing with costs an action brought by a firm of manufacturers at Clinton, Ontario, against the company which had insured their property against fire upon the mutual system by two policies for \$20,000 and \$10,000 respectively. A fire took place on the 16th November, 1901. Street, J., held that, under the events which happened, no contract existed between plaintiffs and defendants for an insurance for the year beginning 31st October, 1901.

G. F. Shepley, K.C., and W. Proudfoot, K.C., for appellants.

J. H. Moss, and C. A. Moss, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

OSLER, J.A.—The plaintiffs' insurance with the defendants for the year 1900-1901 expired at noon on the 31st October, 1901, and I am of opinion that it was not thereafter renewed or continued.

If there was any renewal contract, when did it arise? Not on the 31st October, for defendants' letter of 28th October was not answered, nor was the renewal undertaking sent, nor the cash premium paid to them by plaintiffs as required by that letter. From 31st October to 6th November plaintiffs were uninsured. How does plaintiffs' letter of 6th November or defendants' reply thereto of 7th November alter the situation? In no respect that I can see. By the former plaintiffs merely proposed some modification of the new rate defendants were proposing to charge, and did not, as required

by their letter of 28th October, remit the new undertaking and cash premium. By defendants' letter of 7th November they were not leading plaintiffs to think they were insured or that they were giving him time for payment. They simply re-stated their position and adhered to it. . . . The plaintiffs, instead of paying the cash premium and sending the undertaking and thus closing a contract, postponed doing so and waited for a reply which they got on 12th November by defendants' letter of the 11th. The defendants were firm, and, in my opinion, both parties were then in exactly the same position they were in on the 1st November. Defendants had done absolutely nothing to lull plaintiffs into the belief or supposition that they were insured without payment of cash and delivery of undertaking. Plaintiffs remained silent until 18th November, when, without saying a word of the fact that a fire had occurred on the 16th November, they sent forward the undertaking and a marked cheque for the cash premium. . . .

If plaintiffs, not liking the new rates, had, on the 11th November, or at any time after the 31st October, made application to another company for insurance, they could truthfully have said, in answer to the usual question, that they were not insured in any other company, so far as these defendants are concerned.

Joyce v. Swann, 17 C. B. N. S. 84, and *Ridgeway v. Wharton*, 6 H. L. Cas., distinguished.

Appeal dismissed with costs.

STREET, J.

MARCH 6TH, 1903.

CHAMBERS.

RE FOSTER.

Will—Construction—Devises of Land—Charge of Debts—Mortgage Debts—Apportionment—Valuation—Costs.

Motion by George Sparks, executor of will of William Robert Foster, for an order declaring the construction of certain parts of the will. Testator died 25th February, 1899. He was a farmer and left personalty consisting of farm stock and implements, furniture, cash, etc., valued at \$1,295. His real estate consisted of the north half of lot 34 in the 2nd concession of Nepean, 100 acres, and the west quarter of lot 35 in the 3rd concession, 50 acres. The north half of 34 was subject to a mortgage for \$800 dated 17th September, 1888, and that lot, along with the other, was also subject to a further mortgage dated 3rd April, 1897, for about \$2,700. The testator's debts, apart from the mortgage debts, were

not stated, but it was shewn that the executor had paid: \$699.98 for debts and legal expenses out of the proceeds of the sale of the west quarter of lot 35, which was sold by the executor, with the approval of the official guardian, for \$3,-100, and had also paid thereout \$2,108.75 upon the \$2,700 mortgage, leaving a balance of \$291.27. John G. Foster, the devisee of the north half of 34, gave the executor a bond to repay any part of the sum paid on the mortgage which a Court should declare him liable to pay. W. R. Foster, the devisee of the other lot, died intestate on the 21st March, 1900.

L. A. Smith, Ottawa, for the executor and the administrators of the estates of W. R. Foster and Isabella H. Foster.

J. Lorn McDougall, Ottawa, for John G. Foster.

C. J. R. Bethune, Ottawa, for infants.

N. Sparks, Ottawa, for other adults.

STREET, J., held that by the Wills Act the real estate devised to W. R. Foster and J. G. Foster must, in the absence of the expression of a contrary intention in the will, be taken to have been devised subject to the payment of the mortgage debts upon it, each portion according to its value bearing a proportionate part of the whole of such debts; and a general direction that the testator's debts shall be paid out of his personal estate is not to be taken to be the expression of such contrary intention unless mortgage debts are expressly included in such direction. No contrary intention is to be found in this will. The two sons (the devisees) of the testator are directed to work together until all his just debts are paid. This is, in substance, a direction to them to pay his debts, and, coupled with the devise to them of a farm each, it creates a charge upon the farms of his just debts. That language was evidently intended to cover the debts other than the mortgage debts, and the result is, that testator has devised to each son a farm charged not only with its proportion of the mortgage debts, but with its proportion of his ordinary debts. The debts are to be charged upon the two parcels in proportion to their respective values. The price at which the west quarter of 35 was sold will be a guide as to its value, and the parties may be able to agree as to the value of the other lot, and so save the costs of a reference.

Costs of all parties of this application to be borne by the parcels in the same proportion as the debts. Costs of reference (if any) reserved, and any party insisting on a reference will do so at the risk of costs.

MEREDITH, C.J.

MARCH 6TH, 1903.

TRIAL.

WATEROUS ENGINE WORKS CO. v. LIVINGSTON.

Sale of Goods—Conditional Sale—Property not to Pass till Payment of Price and other Indebtedness—Construction of Contract—Right of Vendors to Re-take Goods.

Action to recover goods sold by plaintiffs to defendant.

W. S. Brewster, K.C., for plaintiffs.

I. F. Hellmuth, K.C., for defendant.

MEREDITH, C.J.—If the property in such of the goods as are mentioned in the order given by defendant to plaintiffs on 13th September, 1900, was not to pass to defendant until he had paid not only for these goods but any other indebtedness which he might incur to plaintiffs at any time before all the goods which were supplied under that order were paid for, plaintiffs are entitled to succeed as to all the machinery and other articles described in the statement of claim which are mentioned in the order.

According to the provisions of the order, the property in the goods which defendant ordered was not to pass to him "until full payment of the purchase price and interest . . . or any other account incurred during the currency of this agreement."

The effect of this term of the agreement is, I think, to prevent the property in any of the goods which were furnished to defendant in pursuance of the agreement passing to him until he had paid, not only the purchase price of these goods, but also any other indebtedness which he might incur to plaintiffs at any time before delivery of the goods which were ordered had been completed. . . .

In this view it is unnecessary to consider the questions as to the application of payments discussed at the trial. . . .

The other order of 10th November, 1900, being in the same terms, the Trevor lathe and appliances which defendant received must be taken to be subject to the terms of that order, and, as something is due by defendant for the goods supplied to him in pursuance of the terms of it, plaintiffs are entitled to succeed as to the lathe and its appliances and such other of the articles mentioned in the order as were supplied to defendant. If defendant's counsel is of opinion that any of the articles claimed by plaintiffs are, upon the view now expressed, not recoverable by plaintiffs, counsel will be heard and a reference, if necessary, directed. Subject to this, there will be judgment for plaintiffs for the recovery of the goods claimed, with costs.

MEREDITH, C.J.

MARCH 6TH, 1903.

TRIAL.

KNY-SCHEERER CO. v. CHANDLER AND MASSEY.

Sale of Goods—Action for Price—Conversion of Goods—Contract—Breach—False Representations—Counterclaim.

Plaintiffs were manufacturers and importers; and wholesale dealers in surgical instruments, carrying on business in New York, and having an intimate connection of some kind with a company carrying on at Tuttlingen, in Germany, the manufacture of surgical instruments which are designated by the name of "Kny-Scheerer." Defendants were wholesale and retail dealers in surgical instruments carrying on business at Toronto. Plaintiffs' claim was for goods sold and delivered by them to defendants, \$4,171.35; for wrongful conversion by defendants of goods, \$7,825.40; and for damages for loss of profits by breach of an agreement of 31st January, 1900. Defendants counterclaimed for \$20,000 damages. The claim of plaintiffs for goods sold and delivered was admitted at \$3,635.98, subject to a question as to the price at which they should have been charged. The principal matter in dispute was the alleged agreement of plaintiffs to establish and maintain at Montreal, and, as afterwards arranged according to the contention of defendants, at Toronto, a well assorted wholesale stock of surgical instruments which should always amount in value to at least \$50,000, and from which defendants might obtain such surgical instruments as they wished to buy when and as they required them.

G. F. Shepley, K.C., and W. E. Middleton, for plaintiffs.

A. B. Aylesworth, K.C., and E. B. Ryckman, for defendants.

MEREDITH, C.J., held that some modifications of the terms of the agreement of 31st January, 1900, were agreed upon by the parties, but these were modifications only in matters of detail, and the rights and liabilities of the parties were to be determined on the provisions of that agreement so modified, and on them only, for no other agreement had been proved. It was proved that before the negotiations which resulted in the agreement of 31st January, 1900, were begun, plaintiffs had decided to open a branch of their business at either Montreal or Toronto, where they purposed keeping a stock of Kny-Scheerer surgical instruments for supplying the trade in Canada and for export to the Australian colonies and to Mexico and certain parts of South

America, and also as a reserve stock for their New York business. This course had been decided on because surgical instruments were admitted into Canada free of duty, but when imported into the United States of America paid a high duty. But it was not a part of the arrangement to which the parties came that plaintiffs should be bound to establish such a branch of their business or that they should keep a stock of their goods in Canada from which defendants might be supplied. Defendants were content to rely upon plaintiffs, in their own interests, carrying out the decision to which they had come, and did not stipulate or intend to stipulate that they should come under any contractual obligation to do so, nor did plaintiffs intend to bind themselves to the taking of any such course. Treating the alleged agreement to establish a stock in Canada as a representation, the defendants could not succeed, because the representation, if made, was only of an intention to do something, and it was a representation which was not untrue, and was one which plaintiffs did not agree to be bound to carry out. Therefore the counterclaim, so far as it related to the claim for damages for breach of the alleged representation, failed.

Defendants' claim to a reduction in the price of the goods sold also failed.

Plaintiffs were entitled to recover \$3,869.04 (less certain deductions) for the price of goods taken over by defendants.

Judgment for plaintiffs for \$7,122.02 with costs, and counterclaim dismissed with costs.

THE ONTARIO WEEKLY REPORTER.

(To AND INCLUDING MARCH 14TH, 1903.)

VOL. II.

TORONTO, MARCH 19, 1903.

No. 10

WINCHESTER, MASTER.

MARCH 9TH, 1903.

CHAMBERS.

SMITH v. LAKE ERIE AND DETROIT RIVER R. W.
CO.

Discovery—Re-examination of Party—Special Circumstances.

Application by defendants for a re-examination of plaintiff for discovery and for postponement of trial in consequence of the absence of a material witness.

H. E. Rose, for defendants.

G. H. Kilmer, for plaintiff.

THE MASTER.—The plaintiff was not candid in stating what he was informed by the master of his barge with reference to the matters in question, although asked to repeat it. It is not usual to require a party to attend for re-examination unless special circumstances are shewn. Special circumstances sufficient to warrant a re-examination have been shewn in this case. The examination will take place immediately, and the other part of the application will stand until that is done. Costs of application to plaintiff in any event.

BRITTON, J.

MARCH 9TH, 1903.

WEEKLY COURT.

RE ROSS AND DAVIES.

Will—Construction—Devise—Power of Sale—Executors—Devisee—Trustee Act—Devolution of Estates Act—Vendor and Purchaser—Parties to Conveyance.

Petition by the vendors, the executors of the will of Elizabeth Tyler, for an order under the Vendors and Purchasers Act, R. S. O. ch. 134.

Elizabeth Tyler was the owner of a large amount of real and personal estate. Part of the real estate consisted of property on Queen street in the city of Toronto, which the executors desired to sell and which Robert Davies desired and had contracted to purchase, but on examination objected to the title.

The question of title depended upon the power of the executors or of the devisee, or both, under the will of Elizabeth Tyler, to sell and make a good conveyance.

Elizabeth Tyler died on 29th July, 1902, at Toronto, leaving two children, Violet Mitchell Campbell and George William Parker. She also left brothers and sisters surviving her. Mrs. Campbell had at the date of the petition three children, all living; Parker was an unmarried man.

The material parts of the will were as follows:

"1. I give . . . to my daughter Violet Mitchell Campbell . . . all my jewellery (save a diamond ring . . .) and also all my wearing apparel, furs, etc., for her sole and absolute use.

"2. I further give . . . to my said daughter . . . \$4,000 to be paid to her by my said son George William Parker within two years after my death, and I hereby charge the payment of the said legacy on the property hereinafter devised to my said son.

"3. All the rest . . . of my real and personal property . . . I give, devise, and bequeath unto and to the sole and absolute use of my said son . . . but charged with payment to my said daughter . . . of the said legacy of \$4,000.

"4. And I hereby direct, and it is my will, that in case of the death of either of my said children without issue, then the whole of my said property and estate is to go to the survivor, and in case of the death of both my said children without issue to go to my brothers and sisters equally."

The executors proved the will. The real estate was incumbered, and it was necessary to sell it to pay off the incumbrances and the \$4,000 legacy.

D. C. Ross, for the vendors.

A. W. Ballantyne, for the purchaser.

BRITTON, J.—Clause 4 of the will is the one occasioning the difficulty, and it is certainly not an easy matter to understand just what Elizabeth Tyler had in her mind at the time she dictated it. The words are in reference to both Violet and George. "Death without issue." Did she mean "death without leaving issue surviving" or did she mean, death without having had any children? Violet at present has three children. Were she to die leaving children, her death would in no way affect the tenure or estate of George in this property. . . . What is the position of George, who at present, under the will, has the beneficial interest in the estate?

O'Mahoney v. Burdett, L. R. 7 H. L. 388, decides that death without issue means without issue surviving the parent, and that a gift over in the case of death without children of

a previous taker, means death at any time without children, and not death prior to death of testator. See also *Woodroope v. Woodroope*, [1894] Irish R. 1; *Cowan v. Allen*, 26 S. C. R. 292.

Under the Devolution of Estates Act, R. S. O. ch. 127, the executors can sell, but only with the approval of the official guardian. Executors under similar circumstances could without the approval of the official guardian have sold before the amendment of sec. 16 of that Act by 63 Vict. ch. 17, sec. 17. The amending section eliminated the words "and there are no debts," and the proviso to sec. 16 now reads, "provided always that where infants or lunatics are beneficially entitled to such real estate as heirs or devisees, or when other heirs or devisees do not concur in the sale, no such sale shall be valid as respects such infants, lunatics, or non-concurring heirs or devisees, unless the sale is made with the approval of the official guardian appointed under the Judicature Act; and for this purpose the official guardian aforesaid shall have the same powers and duties as he has in the case of infants." See *Armour on Devolution*, pp. 165-8.

It is contended by the petitioners that the Trustee Act, R. S. O. ch. 129, secs. 16 and 18, authorize a sale by the executors. I do not think so, as sec. 20 of that Act limits and restricts the operation of secs. 16 and 18. . . . *Re Eddie*, 22 O. R. 556, commented on.

If the executors cannot sell and make a good title, can the devisee . . . do so? This is not a question of distribution, it is a question of sale. Section 20 confers no power of sale. . . . I am of opinion that the intention of the Legislature was, whether these sections accomplish it or not, to provide for the sale of land for payment of debts or legacies, in every case where so charged. . . . This is the case of the devise of the testator's whole estate, charged with payment of a legacy. I think the devisee can sell, and that a good title can be made. . . .

Reference to Lord St. Leonards's Act, 22 & 23 Vict. ch. 35; *Lewin on Trusts*, 10th ed., pp. 530, 531, 538; *In re Wilson*, 34 W. R. 512; *Armour on Devolution*, p. 291; *Bailey v. Ekins*, 7 Ves. 323; *In re Schnadhorst*, [1902] 2 Ch. 234.

I am, therefore, of opinion that the executors and George William Parker and Violet Mitchell Campbell can make a good marketable title without joining the brothers and sisters of the late Elizebeth Tyler in the conveyance.

The costs of all parties should be paid by the estate of Elizabeth Tyler.

WINCHESTER, MASTER.

MARCH 10TH, 1903.

CHAMBERS.

RE SOLICITOR.

Solicitor—Agreement with Client as to Payment of Costs—Dispute as to—Order for Delivery of Bill—Parties to Application.

Application by client for the delivery of a bill of costs by the solicitor and for taxation of bill when delivered. No bill had been rendered by the solicitor. An agreement as to the payment of the costs was disputed by the applicant.

J. D. Falconbridge, for applicant.

J. Bicknell, K.C., for solicitor.

THE MASTER.—The applicant has the right to have a bill delivered: *Duffett v. McEvoy*, 10 App. Cas. 300; *In re West*, [1892] 2 Q. B. 102; *In re Baylis*, [1896] 2 Ch. 107. It was contended that the father and mother and also the assignee of the applicant should be parties to this application. The mother has nothing to do with the matter, and the father and assignee are not necessary parties. But, as the applicant's solicitor does not object to the father and assignee becoming parties, upon their signing a consent they will be bound by the order. Upon this being done, an order for delivery of a bill will be made. No order for taxation need be made at present. If the bill when delivered is found satisfactory, no taxation will be required.

MARCH 11TH, 1903.

DIVISIONAL COURT.

DAVIES v. FRIEDMAN.

Bills and Notes—Promissory Notes—Advance on Bill—To Whom Advance Made—Collateral Security.

Appeal by defendant from a judgment in favour of plaintiff in an action tried in the 10th Division Court in the county of York. The action was brought upon two promissory notes made by defendant payable to plaintiff or order for \$50 each. The defence was that the notes were made by defendant for the accommodation of plaintiff and without consideration. Plaintiff had made a loan of \$600 to defendant and one Seiffert upon a draft drawn by defendant on and accepted by Seiffert and indorsed to plaintiff. Both Seiffert and defendant were present when this draft was prepared and signed and accepted and indorsed, and plaintiff, who was also present, gave defendant a cheque for the advance, less his discount of \$75, which cheque defendant indorsed and upon which he and Seiffert obtained the money. Plaintiff said they told him they were partners; that he had

known defendant for some years, but had never met Seiffert before; that defendant promised that the draft would be paid. Afterwards Seiffert, who lived in Detroit, became bankrupt, and defendant endeavoured to have plaintiff paid out of the estate as much as possible. Finally plaintiff received from Seiffert \$300 in cash and Seiffert's note for \$300, which was unpaid when the action was brought. Before that note matured, plaintiff asked defendant to give him the two \$50 notes sued on, as he wanted money and would discount them. As a matter of fact, plaintiff said, he wanted to get what he could from defendant on account of the debt.

G. Grant, for defendant.

W. W. Vickers, for plaintiff.

STREET, J.—The whole question turns upon whether the original loan was made to Seiffert alone, or to defendant and Seiffert; if the latter, then the conclusion was that the \$300 note of Seiffert and the two notes in question were collateral to the unpaid balance of the original loan; but if the original loan was to Seiffert alone, then there was no consideration for the two notes in question; the evidence was in favour of the first hypothesis, and the Judge below having so found, the finding should not be disturbed.

FALCONBRIDGE, C.J., agreed with the opinion of STREET, J.

BRITTON, J., dissented, giving reasons in writing.

Appeal dismissed with costs.

WINCHESTER, MASTER.

MARCH 12TH, 1903.

CHAMBERS.

OSHAWA CANNING CO. v. DOMINION SYNDICATE.

*Appearance—Action against Partnership—Appearance by Individuals
—Form of—Amendment.*

Application by plaintiffs to add as defendants certain members of the defendant syndicate. An appearance had been entered in the names of these members, but for the defendant syndicate.

R. W. Eyre, for plaintiffs.

H. L. Drayton, for defendants.

THE MASTER.—The appearance must, under Rule 225, be for the individual partners in their own names. The appearance entered is not altogether of that character. While the names are given individually, the solicitors do not apparently appear for them, but rather for the syndicate. Any one of these persons could say that the appearance was not entered

for him. Once the appearance is entered, the action proceeds against the firm in the firm name. The solicitor should add to his name the words "solicitor for the said W. P. Innes, etc., etc., partners in the above firm, the Dominion Syndicate," and the word "partners" should be used in the appearance instead of the word "members." Upon such an appearance being entered, the motion will be refused, and costs thereof will be costs in the cause.

MARCH 12TH, 1903.

DIVISIONAL COURT.

REX v. WALSH.

Constitutional Law—Liquor Act of Ontario, 1902—Referendum—Intra Vires—Creation of Court for Trial of Offences—County Court Judge Acting out of his own County—Adjournment of Trial—Sentence—Summons—Form of.

Rule nisi calling on Archibald Bell, Judge of the County Court of Kent (purporting to act under sec. 91 of the Liquor Act) and D. J. Donahue, clerk of the peace for the county of Elgin, to shew cause why the conviction of defendant by the Judge "for that he (the defendant) did on the 4th December, 1902, at the city of St. Thomas, attempt to put a paper other than the ballot paper authorized by law into the ballot box," should not be quashed. The proceedings were taken under sub-sec. 4 of sec. 91 of the Liquor Act, 1902. The question referred to the electors by sec. 2 of the Act was voted upon throughout the Province on 4th December, 1902. The Crown Attorney for the county of Elgin notified the President of the High Court that he had reason to believe that defendant had committed or attempted to commit the offence of placing or attempting to place unauthorized ballots in the ballot box used in polling sub-division 4 for the city of St. Thomas. Thereupon the President of the High Court designated Mr. Bell, Judge of County Court of Kent, to conduct the trial of the persons accused. The Judge issued a summons calling on defendant to appear before him on 29th December, 1902, at the court house in St. Thomas to answer the charge that he did fraudulently attempt to put into the ballot box a paper other than that authorized by law. Defendant did not appear in person at the time and place named, but counsel appeared for him and applied for an adjournment. The trial, as appeared by the conviction, was continued on that day and on the 19th and 20th January and 3rd February, 1903; and the Judge, having heard witnesses in support of the charge, as well as for the defence, found defendant guilty and sentenced him to be imprisoned for one year in the common gaol of the county of Elgin.

J. A. Robinson, St. Thomas, for defendant, moved the rule absolute.

J. R. Cartwright, K.C., and D. J. Donahue, K.C., for the Crown, shewed cause.

STREET, J.—The main objection to the conviction was that the Legislature had not properly constituted any court or given to any person the necessary authority to try and convict and sentence persons for infraction of the Liquor Act, 1902. The only provision of the Act which can be said to constitute or authorize a Court to deal with offences is subsec. 4 of sec. 91: "In case a county . . . Crown Attorney is informed or has reason to believe that any corrupt practice or other illegal act has been committed in his county or district in connection with the voting . . . he shall forthwith notify the President of the High Court at Toronto, who shall designate a Judge of a County or District Court of a county or district other than that in which such offence was committed, to conduct the trial of the persons accused, and the procedure thereon shall be the same as nearly as may be as on the trial of illegal acts under section 188 of the Ontario Election Act and amendments thereto." While this language falls far short of what one would expect to find in a section intended to create a new tribunal for dealing with an offence created by the statute of which it forms part, yet there is no doubt that the Legislature did intend to declare that persons committing certain specified acts should be liable to certain prescribed punishments, and did intend by this subsection to create a tribunal with authority to try them. "The President of the High Court at Toronto" may without difficulty be taken to mean "The President of the High Court of Justice for Ontario." If the words "to conduct the trial" are to be read in their strict literal sense, and as meaning merely that the Judge designated is to preside upon the hearing of the evidence for and against the person charged, the result is to make the clause useless, because no other provision is made for bringing the person charged before the Court for trial, or for sentencing him afterwards. Having in view the plain general intention of the Legislature, it is the duty of the Court to struggle to give to the language of the section a construction which will best carry that intention into effect. It may be gathered that the intention was to create a Court consisting of the Judge designated for each case by the President of the High Court of Justice for the trial of the person charged, and to give to the Court so created, under the general power "to conduct the trial," the power to bring the person charged before the Court, to try him for the offence, and to sentence him if found guilty, for all these powers are

conferred upon the Judges in sec. 188 of the Ontario Election Act, which is incorporated by reference into sub-sec. 4 of sec. 91. This construction of sub-sec. 4 is justifiable as being a necessary implication from its expressed intention, and is, therefore, no violation of the rule that statutes creating special jurisdictions are to be strictly construed.

It was well within the power of the Legislature to refer the question mentioned in sec. 2 to the vote of the electors, instead of deciding it themselves; they reserved to themselves the power to deal with the question after the vote was taken.

The Judge was not acting as a County Court Judge in the matter, but as a Court specially created by the Act, and the Act intended the Judge who was designated to act out of his own county in holding the actual trial; and there was no reason why he should not issue his summons in his own county or elsewhere.

There was no reason why, having found defendant guilty on 20th January, 1903, the Judge should not adjourn the Court until 3rd February, 1903, as he did for the purpose of sentencing him, nor why he should not sentence him on that day.

The charge in the summons was in the words of sec. 19 (c) of the Ontario Election Act, and was unobjectionable in point of form.

FALCONBRIDGE, C.J., and BRITTON, J., gave reasons in writing for coming to the same conclusion.

Rule nisi discharged. No costs.

STREET, J.

JANUARY 30TH, 1903.

CHAMBERS.

RE O'SHEA.

Will—Construction—Devise of Land—Direction to Devisees—Maintenance of Sisters.

Motion by executors of will of Thomas O'Shea, under Rule 938, for order declaring construction of will.

The testator devised his farm to his two sons, share and share alike, and directed that they should be bound to keep their two sisters until they married, in a suitable manner, free of expense.

G. Edmison, K.C., for the executors and some of the beneficiaries.

R. R. Hall, Peterborough, for Susannah O'Shea.

STREET, J., held that the devisees were bound to give their sisters a home, but were not bound to furnish them with money on which to live apart.

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NO. 11.

HODGINS, MASTER IN ORDINARY.

MARCH 6TH, 1903.

MASTER'S OFFICE.

CITY OF TORONTO v. TORONTO R. W. CO.

Street Railways—Construction—Municipal Corporations—Extra-territorial Rights—Franchise—Forfeiture—Construction of Statutes—Interest as Damages.

Reference to ascertain the amount due to plaintiffs for mileage and other matters as set out in the judgment.

J. S. Fullerton, K.C., and W. C. Chisholm, for plaintiffs.

J. Bicknell, K.C., for defendants.

THE MASTER.—It is not necessary now to make a summary of the cases dealing with the allowance of interest as damages from 7 Wm. IV. ch. 3 to the present time; for the law is well settled that such interest as damages is properly allowable where the original claim is a sum certain, ascertainable by mere arithmetical calculation—as I find it to be in this case. And there are many letters of demand of payment which strengthen the plaintiffs' claim and would warrant a jury awarding such interest as damages for nonpayment. The city's claim of interest will, therefore, be allowed.

On the second branch of the reference, which requires me to inquire and report by whom the portion of the railway track on that part of Queen street (or the Lake Shore road) west of Roncesvalles avenue was constructed, and at what time, and what rights of running upon the said track the defendants possess, I find that the said portion of the said railway track was constructed by the defendants shortly prior to the 30th June, 1893; and that the cost of the same remained in the accounts of the defendants as a charge against their expenditures until the 30th April, 1898—or about a month after the trial of this action,—at which date an entry was made in their accounts of \$248.50 against the Mimico Electric Railway Company for the cost of putting down the track in question. This action appears to have been commenced on the 5th February, 1897, and was tried on the 28th March,

1898; judgment was pronounced in favour of the plaintiffs on the 2nd September, 1898.

The statute confirming the agreement between the plaintiffs and the defendants respecting the street railway, was passed in 1892, 55 Vict. ch. 99, and declared that the purchasers of the original street railway (now the defendants) were entitled to the exclusive right and privilege of using and working the street railways in and upon the streets of the city of Toronto—except . . . that portion of Queen street (Lake Shore road) west of Dufferin street; and also that the purchasers (company) acquired and were entitled to such right and privilege (if any) over the said excepted portion of Queen street . . . as the corporation of the city of Toronto had at the time of the execution of the said agreement (1st September, 1891), power to grant for a surface street railway. Adding a proviso that nothing should limit or interfere with, affect, or prejudice the rights and privileges (if any) of the corporation of the county of York or of the Toronto and Mimico Electric Railway and Light Company (Limited) over the said portion of Queen street (Lake Shore road), as they existed at the time of the passing of the said statute (14th April, 1892).

At that date this portion of the Lake Shore road, which had originally been within the municipal boundaries of the town of Parkdale, was, by the annexation of Parkdale to Toronto in 1889, brought within the municipal boundaries of the city of Toronto.

This York road was constituted a turnpike or macadamized road by 7 Wm. IV. ch. 76, sec. 4 (1837), and was acquired by the united counties of York and Peel in 1864. And by the Act 29 Vict. ch. 69 (1865) it (together with the other York roads) was vested in the county of York. These York roads were originally placed under the control of commissioners, who by the Act 3 Vict. ch. 73, sec. 2, "had power and authority over the several macadamized roads so far as the same has been authorized by any Act of the Legislature."

For all practical purposes of keeping the road in repair and collecting tolls, the corporation of the county of York occupied, as to this Lake Shore road, the same position as the original commissioners, or as an ordinary turnpike roads company would occupy. The municipal jurisdiction of the corporation of the city of Toronto over it as a street or highway was not ousted, though to some extent limited by reason of the toll or turnpike franchise of the county.

It is not only a general principle of municipal law, but is part of the Municipal Act, that the inhabitants of the ter-

ritory shall constitute the municipal corporation; and it is inconsistent with that principle and Act to give to the municipal corporation of a county municipality any municipal jurisdiction over the territory of a city, or any municipal power of interference which might violate the rule of local self-government or in any way create an antagonism in the administration of the municipal law.

The Mimico Railway Act and agreement are set out in the Act 54 Vict. ch. 96 (1891), and provide (clause 5) that the location of the railway on the Lake Shore road shall not be made until the plans shall have been submitted to and approved by the warden, county commissioners, and engineer. And also (clause 9) that the railway shall not be opened to the public, nor put in operation, until the sanction of the warden and commissioners of county property has been previously obtained by enacting a special resolution to that effect, which sanction may be granted upon a certificate of the county engineer declaring that the railway has been constructed in accordance with the prescribed conditions.

As a corollary to the general principle of municipal law above stated, this provision must be read as not ousting the jurisdiction and powers of either the municipal corporation of the city of Toronto, or of its city engineer, as set out in the statute and agreement of 1892, in so far as the same are operative over this Lake Shore road, as one of the city streets or highways, especially in clause 10 of the conditions, which is made part of the Act, and which provides that any additions to the present rails, tracks, and road-bed "shall be done under the supervision of the city engineer," which, I think, were clearly binding on the defendant company.

By the Mimico Railway Act of 1891 (54 Vict. ch. 96) an agreement between the Toronto and Mimico Electric Railway and Light Company (Limited) and the municipal council of the county of York, dated the 23rd December, 1890, was ratified, confirmed, and declared to be valid and binding, and the company were authorized to locate and operate their electric railway along the north side of that portion of the Lake Shore road owned by the county.

Among the provisions in this statutory confirmed agreement was the following: "21. The company, their successors or assigns, shall construct and have open for travel their proposed line of railway or tramway within two years from the first day of January, 1891; and in default thereof, the company, their successors or assigns, shall forfeit all the rights, privileges, and advantages granted by this agreement or acquired thereunder; and all such rights, privileges, and ad-

vantages shall cease and determine, as if this agreement had not been granted, and the consent of the parties of the first part (county of York) had not been had or obtained by the company."

By sec. 2 of this Act the council of the county of York were authorized by resolution to extend the time for beginning or completing the line of railway, or any portion thereof, as set out in the agreement.

The agreement with the above time-limit for constructing and having open the proposed line of railway became part of the statute; and that statutory time-limit expired, and the franchise right lapsed, on or about the 31st December, 1892, at which date the portion of the railway on this Lake Shore road, which was then within the municipal jurisdiction of the city of Toronto, had not been commenced. It had always been territorially separated from the western portions of the Mimico Electric Railway by a crossing of the Grand Trunk Railway. The failure of the Mimico Company to construct their railway track on this portion of the Lake Shore road, before the expiration of the statutory time limit, brought into full operation the grant of franchise from the city to the defendant company to build the said railway track as a part of their system under the Toronto Railway Act of 1892, and the agreement it validated.

The powers of the county officers mentioned in the Mimico Act and agreement of 1891 must be construed as the powers to be exercised by officers of a turnpike company, and not as the powers of officers of an outside municipal corporation clothed with independent municipal authority within any portion of the territory of the city of Toronto, or which would in any way oust the statutory powers of the city or its engineer or other officer.

But perhaps it is not necessary to pursue this argument further, except as introductory to the consideration of the effect of the annexation of this Lake Shore road and adjoining territory to the city of Toronto in 1891 and 1893. If it were an ordinary highway, its annexation would at once bring it under the municipal jurisdiction of the annexing municipality, and under the statutory supervision of the officers of such annexing municipality.

In this case, however, there is, with the annexation, the additional right in the city by the grant and conveyance of the franchise title in the Lake Shore road from the county of York to the city of Toronto by virtue of the agreement of the 3rd February, 1893, and confirmed by the Act 56 Vict. ch. 85. By those instruments the municipal (if any) and com-

pany powers and title of the county of York, became vested in the municipal corporation of the city of Toronto; and the latter, in addition to their general statutory and special jurisdiction and those of the city engineer, were exercisable over the construction of the railway on this portion of the Lake Shore road.

But prior to these latter instruments granting the franchise title of the county of York to the city of Toronto, the franchise rights of the Mimico Railway Company to construct and have open their railway on this portion of the Lake Shore road, had lapsed, and had become forfeited, on and after the 31st December, 1892.

The condition of forfeiture, which the Legislature annexed to its confirmation of the agreement, is contained in the 21st clause, with a power under sec. 2 of the Act to the county of York to extend it from time to time on certain terms. And it is expressed in clear and unambiguous language, and the railway company, in accepting the grant with the condition of forfeiture, must, therefore, abide by the result, having made no effort to get the authorized extension of time.

The general rule of law as to the forfeiture of franchises is that a forfeiture created by statute is self-executing; while one arising by operation of the common law must be so declared and adjudged by the Courts.

Thus, under a statutory provision making the non-user of a franchise within a limited time void, it was held that the statute was operative and effectual as to the avoidance of the franchise; and that it was not necessary to institute proceedings in a Court at the instance of the state, to have the statutory avoidance declared operative: *New York, etc., R. Co. v. Boston, etc., R. Co.*, 36 Conn. 196.

So where the Legislature made the continued existence of a corporation dependent upon its compliance with the condition of building its road within a certain limited time, adding that if it failed to exercise its powers to do so "this Act and all the powers, rights, and franchises herein and hereby granted, shall be deemed forfeited and terminated," it was held that it had lost its corporate right to construct its road under the Act; and that it was not necessary to have such forfeiture declared in an action brought at the instance of the Attorney-General: *Brooklyn Steam, etc., Co. v. City of Brooklyn*, 78 N. Y. 524.

I must, therefore, find that this portion of the track on Queen street (Lake Shore road) was constructed by the defendant company as part of their own undertaking, and that their rights of running upon the said track are governed by and subject to the conditions mentioned in the Act of 1892.

BRITTON, J.

MARCH 14TH, 1903.

CHAMBERS.

RE MACKEY.

Administrators Pendente Lite—Investment of Moneys—Trustee Act—Trustee Investment Act.

Motion by J. de St. Denis Lemoine and M. J. Gorman, administrators pendente lite of the estate of William Mackey, deceased, upon notice to the next of kin, for an order declaring that they were empowered to invest moneys in their hands during the pendency of litigation concerning the will of the deceased, in securities authorized by the Trustee Investment Act. The deceased died on 1st December, 1902, leaving an estate of \$1,200,000, and appointing the applicants as executors. An action was pending in the High Court, in which the validity of the will was to be tried, and in the meantime the Surrogate Court appointed the executors as administrators pendente lite. They had received a large amount of money, which they wished to invest at higher rates of interest than could be obtained from chartered banks, as the litigation was liable to be somewhat prolonged.

M. J. Gorman, K.C., for the applicants, referred to *Gallivan v. Evans*, 1 B. & B. 191, in which it was held that the position of an administrator pendente lite, with regard to investments, differed from that of an executor or trustee, and that the former could not be held liable for interest on money in his hands pending the litigation.

BRITTON, J., held that this was a proper case in which to apply for a direction under the Trustee Act, and that there was no difference in principle between the position of the applicants with regard to the money in their hands, and that of an executor or trustee under the Trustee Investment Act; and he therefore made the order asked for; costs to be paid out of the estate.

FALCONBRIDGE, C.J.

MARCH 16TH, 1903.

CHAMBERS.

RE WEBB.

Will—Construction—Power of Executor to Mortgage Lands Devised.

Motion by Thomas P. Webb, executor of the will of Horatio N. Webb, and administrator with the will annexed of the estate of Elizabeth Ann Webb, for an order declaring the construction of the wills, and for the opinion, advice, or direc-

tion of the Court pursuant to sec. 39 of the Act respecting trustees and executors and the administration of estates, and for the determination of a question arising in the administration of the two estates, as to whether the applicant has power under the wills to mortgage the lands devised by the two wills.

Horatio N. Webb devised his lands to his brothers and sisters equally as joint tenants, to be divided whenever the executor should see fit, but to have and to hold to them, their heirs and assigns forever, and empowered the executor, if he should consider it for the benefit of the devisees to mortgage or sell and dispose of all his estate or any part thereof.

Elizabeth Ann Webb devised all her property to the executor in trust to receive the rents, issues, and profits, or proceeds of sale, thereof, and to devote the same towards the education and maintenance of the children of the testator until majority, and then to divide the same among the children as the executor might judge best.

A. G. Chisholm, London, for applicant.

E. W. M. Flock, London, for the devisees.

FALCONBRIDGE, C.J.—The question is really academic, for the London and Western Trusts Company, the proposed mortgagees, are not under any obligation to advance the moneys. It is not like an application under the Vendor and Purchaser Act. Even if it were, the rule of the Court is not to force a doubtful title on an unwilling purchaser. There is no power to mortgage under the will of Elizabeth Ann Webb, having regard to the principle laid down by Lord St. Leonards, L.C., in *Stroughill v. Anstey*, 1 DeG. M. & G. 635. Order accordingly. Costs of all parties out of the estate.

MACLENNAN, J.A.

MARCH 17TH, 1903.

C.A.—CHAMBERS.

RE NORTH GREY PROVINCIAL ELECTION.

BOYD v. MCKAY.

Parliamentary Elections—Controverted Election Petition—Neglect to Leave Copy with Local Registrar—Fatal Irregularity—Taking Petition off Files—Refusal to Extend Time.

Motion by respondent to take the petition off the files or to stay proceedings for irregularity, and motion by the petitioner to extend the time for leaving a copy of the petition with the local registrar, etc.

The petition against the return of the respondent was filed with the local registrar of the High Court at Owen

Sound in pursuance of the Controverted Elections Act, sec. 10, as amended by 62 Vict. ch. 6, sec. 2, on the 9th February, 1903, the last day allowed for doing so, and was served on the respondent on the 14th February. No copy of the petition was left either with the local registrar or with the registrar of the Court of Appeal, to be sent to the returning officer, as required by Rule 1 (2), nor did the local registrar send a copy of the petition to the returning officer as directed by sec. 12 (1) of the Act, as amended by 62 Vict. ch. 6, sec. 3. The consequence was, that no notice of the filing of the petition was advertised by the returning officer. This omission was not discovered by the respondent until Saturday 28th February. On Monday 2nd March the respondent served notice of his present motion. Upon this the petitioner left a copy of the petition with the local registrar on the 4th March, and the proper advertisement was published by the returning officer on the 6th March. On the 5th March the petitioner served notice of his present motion to extend the time for leaving the copy or to allow the copy left on the preceding day as a sufficient compliance with the statute and Rules.

R. A. Grant, for the respondent, relied upon *The Lisgar Case*, 20 S. C. R. 1, and *The Burrard Case*, 31 S. C. R. 459.

I. F. Hellmuth, K.C., for petitioner, contended that, having regard to the amendments of the Act by 62 Vict. ch. 6, and no corresponding amendment having been made of the Rule (1, sub-sec. 2), there was no express obligation on the petitioner to leave a copy with the local registrar, the Rule, as it stands, only directing that with the petition shall also be left a copy thereof for the registrar of the Court of Appeal, etc.

MACLENNAN, J.A.—Reading the Rule and having regard to the amendments, the obligation to leave the copy with the local registrar along with the petition is clear. The Court having jurisdiction in Provincial elections is the Court of Appeal, and the effect of the amendments of the Controverted Act is to make the local registrar of the High Court, so far as election petitions are concerned, local registrar of the Court of Appeal; and when the Rule directs that with the petition there shall be left with the said registrar a copy etc, that must be held to mean the same officer with whom the petition is to be filed, although the words “of the Court of Appeal” are added to the word “registrar.” But, even if Rule 1, sub-sec. 2, could not be held to apply, so as in terms to require a copy, as well as the petition itself, to be left with the local registrar, it would still be clearly obligatory to do so by reason of sec. 113 of the Act, making the English prac-

tice and Rules applicable. The Lisgar and Burrard cases, supra, applied and followed. Therefore it was obligatory upon petitioner to have left a copy along with the petition with the local registrar on the day on which the petition was filed.

Rule 58, which authorizes the Court or a Judge to extend the time appointed for doing any act or taking any proceeding, either before or after the time has elapsed, cannot be applied to aid the petitioner. The requirement which has been neglected is one of great importance, as pointed out in the cases cited, and unless the Court could extend the time for filing the petition, it could not do so for the leaving of the copy, which should be done at the same time. The Rule can not be complied with by leaving a copy not with the petition, but at some other time. And, besides, no good reason or ground was shewn for granting the indulgence under Rule 58. The only excuse was that the petitioner's solicitor had no copy of the Rules and was consequently in ignorance of what ought to have been done.

Respondent's motion granted and petitioner's motion refused, both with costs.

MARCH 18TH, 1903.

ELECTION COURT.

RE EAST MIDDLESEX PROVINCIAL ELECTION.

ROSE v. ROUTLEDGE.

Parliamentary Elections — Corrupt Practices — Bribery—Treating — Agency—Evidence.

Controverted election petition.

W. Cassels, K.C., E. Meredith, K.C., W. D. McPherson, and P. H. Bartlett, London, for petitioner.

A. B. Aylesworth, K.C., and J. M. McEvoy, London, for respondent.

THE COURT (MACLENNAN, J.A., and FALCONBRIDGE, C.J.) delivered judgment as follows:—Of the 135 charges contained in the particulars the 1st, 3rd, and 4th were charges against one John McArthur, alleged to have been an agent of the respondent. The first was an alleged offer of \$3 or \$4 to William Griffin, two or three days before the election, to induce him to vote for the respondent. The witnesses in support of the charge were Griffin and his daughter. The charge was denied by McArthur, and there were other circumstances throwing doubt upon Griffin's story. A fortnight before the trial the petitioner's agents placed a man named Prince in Griffin's house,

who boarded and lodged there until the trial, and accompanied the two witnesses to the trial. The daughter admitted, with great reluctance, that Prince's presence was connected with the election, and that the evidence she and her father were to give at the trial was the principal thing spoken of in the house while Prince was there. . . . Such treatment of witnesses by parties interested is sufficient to discredit them. It would not be safe to give effect to the evidence of either Griffin or his daughter against the denial of McArthur and other evidence.

The next charge against McArthur was that he had canvassed one Charles Sagaman on behalf of the respondent and had offered him \$3. Sagaman related a conversation in which McArthur asked about his vote, and inquired whether \$3 would be any use to him (Sagaman). In cross-examination he said he did not know whether McArthur was joking or in earnest, and in re-examination that he did not know that he took what McArthur said in earnest. McArthur denied positively that he made the remark about money. We must hold that the charge was not established.

The third charge was of an attempt by McArthur to bribe one Fortner by saying to him he would make it worth his while if he voted for respondent, and that he had some loose change about him. This charge was also denied by McArthur, and Fortner said in cross-examination that there was no offer made. We hold that this charge was not made out.

McArthur canvassed for the respondent, but he was not shewn to have been a delegate to the convention, nor a member of any committee. He was present at a committee meeting at Lambeth, but only as a spectator. There was no evidence of any authorization or recognition of his acts by the respondent. Inasmuch as McArthur was authorized and requested by John McDougall to canvass Griffin, and had canvassed for two or three days in company with J. H. McGregor, including his canvass of Griffin, he was a sub-agent of the respondent in that particular case, if McDougall and McGregor were themselves agents of the respondent.

The respondent was nominated by a convention on the 1st February, and in accepting the nomination he said: "There are three things essential to success: first, a good cause; second, proper organization; third, hard work. The first we have, the second and third will largely depend on you." The convention was of delegates selected by the Liberal Association of the riding. McDougall and McGregor were delegates. We must hold, following the West Simcoe Case, 1 Ont. Elec. Cas. 130, that by the words quoted the respondent constituted every delegate who was present his agent, and became responsible for all that was afterwards

done by them in organization and work for the purpose of the election. McArthur had no authority (sufficient to bind the respondent) to canvass either Sagaman or Fortner, and his agency arose alone from the authority and sanction of McDougall and McGregor, who were delegates to the convention and members of committees, and must be confined to the case of Griffin: Leigh & LeMarchant, 4th ed., pp. 76-8, and cases there cited.

Charge 30 was of a payment of \$2 by one John Bell, who was a delegate to the convention, to James Judge to induce him to vote for respondent. The payment was denied by Bell. Judge was an old man, and the evidence shewed that about ten days before the trial he was taken from home by one McFarlane and kept virtually in hiding. Apart from this circumstance, the charge was not established by the evidence, but it would be impossible to trust the evidence of a witness whom the parties producing him were themselves not able to trust.

Charge 25 was a charge of treating a large number of electors assembled at a meeting for the purpose of promoting the election at the Canadian Packing Company's premises near Pottersburg, contrary to sec. 161 of the Ontario Election Act. The respondent requested Daniel McIntyre, who was a delegate to the convention and a member of a committee, to go with him to the company's place to introduce him to the workmen, some of whom were voters. About three o'clock in the afternoon, the workmen, about 50 in number, half of them being voters, were assembled, and the respondent addressed them for a quarter of an hour on behalf of his candidature. After the meeting was over, and the workmen had dispersed, and after the respondent and McIntyre had left the room, McIntyre asked the foreman to tell the men he would leave a drink for them at an inn in the neighbourhood. This was not in the respondent's presence, nor heard by him. When the men were leaving work about six, the foreman told them what McIntyre had said, and eight or ten of them got a drink at the inn without payment. This charge as laid, of treating a meeting assembled to promote the election, under sec. 161, altogether fails, because the meeting had come to an end and had dispersed before anything had been said about the treating, and the men were not told anything about it until nearly three hours afterwards: North Waterloo Case, 2 Ont. Elec. Cas. 76; Prescott Case, 1 Ont. Elec. Cas. 116, 117. The charge cannot be supported under sec. 162 (1) as one of corrupt treating of individuals in order to be elected. McIntyre's object was to retain the goodwill of the factory people towards himself as a customer having large dealings there, and in treating he followed a previous habit in his inter-

course with them, and did not treat for the purpose of affecting the election.

Charge 122 was one of treating a committee meeting at Charles's hotel, Belmont, by bringing into the room for the use of the members of the committee a box of cigars. This was done by Neil McCallum, who was a delegate to the convention; he said he did it at the request of the landlord. No evidence was given to shew by whom payment was made. For want of such evidence, the charge fails, as it is the person at whose expense the refreshment is supplied who alone is guilty of the offence.

It was also charged that there was corrupt treating at the bar after the meeting. Although there was the usual treat in such cases, in which the respondent took part, the evidence failed to shew that there was any corrupt intent on the part of any one.

Charges 70, 71, and 72 were of treating by the respondent or his agents on the 1st February, the day on which he was nominated by the convention. The charges were founded on sec. 162 (2), and were of giving refreshment "extensively or generally or in a miscellaneous manner to electors." The only evidence was that of the respondent himself, who admitted having treated several persons, some of whom might have been electors of East Middlesex; but he denied that his treating had any relation to the election. The mere fact of treating generally or extensively or miscellaneously is *prima facie* sufficient to constitute a corrupt practice, but only *prima facie*. The treating must be done corruptly. If it be shewn that it was not in fact so done, it is no offence now any more than it was before the enactment of sec. 162 (2). There may still be innocent treating, though if it be general or extensive or miscellaneous, the onus of shewing that it is innocent is thrown upon the respondent. And an antecedent habit of treating must still help to rebut the inference of corrupt intent.

The respondent became a "candidate" within the definition in sec. 2, sub-sec. 8, on the 27th March, by virtue of 1 Edw. VII. ch. 41, sec. 1; but the definition does not prevent treating before the 27th March being an offence. The Act applies to everything done at any time before an election by a person who is afterwards elected: *Youghall Case*, 3 Ir. C. L. 530, 1 O'M. & H. 293.

Charge 113 was of treating at Chittick's hotel by the respondent and one Vining, his secretary. . . . This and a number of similar charges failed upon the evidence, because the treating, though established, had no relation to the election.

The petitioner contended that the instances of treating by the respondent and Vining being so many, and the sum spent in that way so considerable, the respondent should be held to have been guilty of extensive or general or miscellaneous treating within sec. 162 (2), and that the prima facie effect had not been rebutted. We do not think so. The respondent is a physician with a large country practice, and therefore constantly on the road. He is also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating. He continued that habit until the writ for the election was issued, on the 22nd April, after which he treated no more. This case is very different from the West Wellington Case, 2 Ont. Elec. Cas. 16, 17-20, where the treating was corrupt. In this case, taken either separately or collectively, no corrupt intent has been shewn in any of the instances of treating proved, either on the part of the respondent or any of his agents.

Petition dismissed with costs.

WINCHESTER, MASTER.

MARCH 19TH, 1903.

CHAMBERS.

SCHMUCK v. McINTOSH.

Defamation—Discovery—Examination of Defendant—Information as to Source of Libel—Submission of Question—Rule 455.

Motion by plaintiff for order directing one of the defendants in an action for libel to attend for re-examination and give the source of information on which the writing complained of as libellous was based. The plaintiff concluded his examination without first submitting the questions which the defendant refused to answer, as required by Rule 455.

J. E. Jones, for plaintiff.

H. E. Rose, for defendants.

THE MASTER held, following *Hennessy v. Wright*, 24 Q. B. D. 445, and *Hope v. Brash*, [1897] 2 Q. B. 188, that the application must be refused. Costs in any event to defendants.

FALCONBRIDGE, C.J.

MARCH 19TH, 1903.

TRIAL.

SUTHERLAND-INNES CO. v. SHAVER.

Fire—Negligence in Setting out—Destruction of Neighbour's Property—Cause of—Failure to Prove—Admissions of Defendant—Delay in Bringing Action—Costs.

Action for negligence in setting out fire, alleged to have caused the destruction of buildings on plaintiffs' farm.

A. B. Aylesworth, K.C., and G. B. Douglas, for plaintiffs.
M. Wilson, K.C., and J. G. Kerr, for defendant.

FALCONBRIDGE, C.J.—There is a good deal disclosed in defendant's own evidence at the fire inquest strongly pointing in the direction of negligence on his part in setting out fire as he did on the 23rd October, 1901. And these admissions are not very satisfactorily explained away by his statements on examination for discovery and at the trial.

The case, however, falls to be disposed of on another ground.

The evidence as to the origin of the fire which destroyed the plaintiffs' property is purely circumstantial. It is not the ordinary case where the course of the conflagration can be directly traced from the one man's farm to his neighbour's property, from field to field and from fence to fence.

There were 14 witnesses examined for the plaintiff and 35 for the defence. The statements as to the existence and course of other fires in the vicinity and as to the direction of the wind at different times of the day were as positive and as conflicting as could well be imagined.

If defendant were on his trial for some form of criminal negligence, I should have been obliged either to withdraw the case from the jury or to suggest to them that it would be unsafe to convict.

And assuming that in a civil cause the Court or jury may not be bound to reach the same high degree of moral certainty, I am still unable to say that the plaintiffs, in view of the other possible causes proved or suggested by the evidence, have succeeded in removing the nature of one's belief in the truth of their theory from the domain of strong probability to that of reasonable moral certainty or conviction.

The fire took place on 23rd October, 1901. There was an inquest, at the instance of an insurance company, held in April, 1902. On 13th August, 1902, plaintiffs' solicitor wrote to defendant threatening suit. The writ was issued on the 4th October, 1902, and the case came on for trial 17 months after the event. If plaintiffs have lost anything in the way of evidence by the delay, that is their fault or misfortune as the case may be. They had before them in April, 1902, the statements of defendant which they now point to as proving negligence.

Those statements, however, seemed to afford justification for the bringing of the action, and, for this and other reasons, in dismissing the action, I make no order as to costs.

OSLER, J.A.

MARCH 19TH, 1903.

TRIAL.

KENNAN v. TURNER.

Assessment and Taxes—Tax Sale—Validity of—Burden of Proof—Unoccupied Lands of Non-resident—Notice of Assessment—Collector's Roll—Proof of Arrears—Treasurer's List—Duties of Clerk and Assessor—Omission of Clerk to Furnish Treasurer with Copy of Assessor's Return—Delay in Bringing Action—Leave to Amend Defence.

Action for a declaration that a certain tax sale and conveyance under which defendants claimed title to and were in possession of lot 8 on the west side of Pilgrim street, in the town of Sault Ste. Marie, were illegal and void as against plaintiffs, the rightful owners of the lot.

J. E. Irving, Sault Ste. Marie, for plaintiffs.

W. H. Hearst, Sault Ste. Marie, for defendants.

OSLER, J.A.—The plaintiffs proved a sufficient paper title to the lot. But it was also proved that the defendant Turner was in possession and had erected a valuable building on the lot, claiming title under a sale made by the town treasurer on 7th October, 1898, for arrears of taxes for 1895-97. A deed made in pursuance thereof on 15th November, 1899, registered 12th December, 1899, by the proper officials to the assignee of the tax purchaser, and a subsequent conveyance to the defendant Turner, duly registered, were also proved. The action was not brought till the 23rd April, 1902.

The onus of proof of the invalidity of the tax title, by the form of the record and the nature of the relief sought, rested on plaintiffs.

The plaintiff Kennan paid the taxes for 1893 and 1894. These were the last payments made by him.

The assessment rolls for 1895, 1896, and 1897 were proved, the lot appearing therein to be assessed to the plaintiff Kennan. It appears to have been duly and regularly assessed in that way, although it was not occupied, and Kennan did not reside in the country. He was known to be the owner, and it will be assumed that, as he had notice of the assessment, not only in those years, but in subsequent years, and did not appeal, he had requested his name to be set down on the roll.

It was proved that the taxes imposed in respect of the said assessment were duly entered upon the collector's roll for each of these years; that the collector was unable to collect them, and that they were returned by him uncollected, the

reason assigned being "non-resident," to the treasurer of the municipality, in each year, as required by sec. 147 of the Assessment Act. The clerk at the same time received or retained what I must hold to be a sufficient duplicate of the collector's accounts, through irregular in form, and, as required by the same section, sent notice to the plaintiff and others of the arrears of the taxes which appeared to be due by them for each year respectively. Taxes for the whole period of 3 years next preceding the 1st day of January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day (sec. 152, last clause), the lot in question was liable to be sold for such arrears during the year 1898 (sec. 152.)

The treasurer's list of lands in the town of Sault Ste. Marie (including this lot) liable to be sold for taxes during that year was furnished, as required by sec. 152, by him to the clerk on the 31st January, 1898.

The clerk filed the list in his office, and delivered a copy of it to the assessor for 1898, as required by sec. 153. The lot was still, as it had hitherto been, unoccupied; but the plaintiff, though not residing within the municipality, being known to the owner, the assessor notified him that the lot was liable to be sold for arrears of taxes, and made the proper entry thereof in his list; and he returned such list to the clerk with the assessment roll. The clerk filed it in his office for further use. I do not find that the assessor signed the list as required by sec. 153, but he attached to it (printed thereon and signed by him) his certificate, as required by sec. 154 of the Act, of the performance of the duties required of him in respect thereto. The certificate is verified, as the section requires, by the oath of the assessor, indicated sufficiently, I think, though in a rather informal manner, by an under-written jurat.

The clerk seems to have performed the duty imposed on him by sec. 155, of examining the assessment roll of 1898, when returned by the assessor, and furnishing the town treasurer with a list, called "occupied return," of lands and lots embraced in the treasurer's list furnished to him under sec. 152, which appeared in the resident assessor's roll of 1898 as having become occupied, or insufficiently described, etc. The lot in question was, of course, not in the list so furnished under sec. 155, being shewn, as I have said, by the assessor's return to the treasurer's list to be unoccupied.

The clerk, however, omitted to furnish the county treasurer, as he is required to do by the last clause of sec. 153, with a true copy of the list furnished by the latter under sec. 152, with the assessor's return certified to by the clerk under

the seal of the corporation, which is, in effect, the treasurer's list with the assessor's annotations thereon.

According to the evidence of the treasurer, it had not, until very recently, been the custom in this municipality to do so, because by comparing the duplicate of the list furnished by the treasurer under sec. 152, with the "occupied return" received by him from the clerk under sec. 155, the treasurer got all the substantial information he would have got from a copy of his own list, with the assessor's notes or remarks thereon, and it was assumed that lands embraced in the treasurer's list, but not found in the "occupied return," would be sold. The subsequent proceedings, the mayor's warrant to the treasurer to sell, the advertisement of the sale, and the sale, all followed in regular order, and were completed by the deed under which the defendants make title, as already mentioned.

The only formidable objection to the tax sale was based on the clerk's omission to do the act required by the last part of sec. 153 of the Assessment Act, viz., to furnish the county treasurer with a true copy of the assessor's return in respect of the lands listed by the treasurer for sale under sec. 152. . . . The taxes for 1895-7 had been regularly and validly imposed and assessed. They were all due and in arrear before the sale in October, 1898, and the taxes for 1895 had been due for the third year, or for the three years, preceding the sale.

Whether the requirement of sec. 153 is of so essential a character as, even conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action comes into operation, I do not decide. It is arguable that it is only intended for evidential purposes. But in this case . . . its omission worked no injury to plaintiffs, who had all the notices and delays to which they were entitled, and in respect to whose land all the conditions essential to a valid tax sale, except the one I have mentioned, if it were one, existed.

In *Love v. Webster*, 26 O. R. 453, *Wildman v. Tait*, 32 O. R. 274, *Jeffrey v. Heweis*, 9 O. R. 364, *Dalziel v. Mallory*, 17 O. R. 80, *McKay v. Crysler*, 3 S. C. R. 436, and *Whelan v. Ryan*, 20 S. C. R. 65, there was no legal or valid assessment of the land afterwards sold, and therefore no taxes in arrear at the time of sale; and in *Donovan v. Hogan*, 15 A. R. 432, the taxes had been paid before the sale.

The action not having been brought for more than three years after the sale, and more than two years after the deed, defendants should have leave to plead in answer to it the provisions of secs. 208 and 209 of the Assessment Act. The pro-

viso to sec. 2 of 1 Edw. VII. ch. 70 seems to exclude its operation in this case. Upon the defendant making this amendment, action dismissed with costs.

STREET, J.

MARCH 20TH, 1903.

CHAMBERS.

BATEMAN v. MAIL PRINTING CO.

Libel—Defence—Fair Report of Proceedings in Court—Discovery—Examination of Officer of Defendants—Malice or Motive.

Motive by plaintiff to commit the manager of the defendant company for refusing to answer certain questions upon his examination for discovery. The action was for libel. The matter complained of was the publication of an item in the defendants' newspaper. The defendants pleaded that it was a fair and accurate report of proceedings in a police court. The questions which the manager refused to answer related to a former action brought by plaintiff against defendants.

W. R. Smyth, for plaintiff, contended that he was entitled to shew malice or malicious motive in the defendants.

J. B. Clarke, K.C., for defendants, contra.

STREET, J., held that the questions should be answered, and made an order requiring the manager to attend and answer, with costs to the plaintiff in any event.

FALCONBRIDGE, C.J.

MARCH 20TH, 1903.

WEEKLY COURT.

REX EX REL. ZIMMERMAN v. STEELE.

Municipal Corporations—Election of County Councillor—Disqualification—Member of "School Board for which Rates are Levied"—Resignation as School Trustee after Nomination and before Polling—Claim of Relator to Seat—Notice to Electors.

Appeal by relator from order of Deputy Judge of County Court of Welland dismissing the relator's motion in the nature of a quo warranto to void the election of the respondent as councillor for the 3rd county council division of the county of Welland, upon the ground that at the time of the election the respondent was a member of the school board of school section 9 of the township of Humberstone, and was therefore not qualified to be a member of the county council. By 2 Edw. VII. ch. 29. sec. 5, sec. 80 of the Municipal Act was amended by making a member of "a school board for which rates are levied" ineligible as a county councillor. The chief question in this case was, whether the respondent by resigning his membership in the school board after the nomi-

nation and before the polling day had rendered himself eligible as a county councillor. There was no school within the boundaries of this particular section, and no teacher taught within its limits. But the section was organized, with a secretary and treasurer, and the school rates levied on the section and other moneys received by the board under the Act were paid by the board to the board of an adjoining section, which possessed accommodation for the school children living in section 9.

W. M. German, K.C., for relator.

L. C. Raymond, Welland, for respondent.

FALCONBRIDGE, C.J.—The trustees of section 9 come within the terms of the amending Act, for rates were levied in this section at the instance of the school board for the section, and the ultimate destination of the moneys does not affect the point.

Even assuming that sec. 76 of the Municipal Act does not, in view of the interpretation clause (sec. 2, sub-sec. 9), apply in terms to a county council, that section deals with qualification only, while sec. 78 deals with disqualification, and disqualification has relation to the time of the election, and not to the time of the acceptance of office. The day appointed for the nomination is the day of the election, and the disqualification of a candidate has reference to that day. *Regina ex rel. Rollo v. Beard*, 3 P. R. 357, and *Regina ex rel. Adamson v. Boyd*, 4 P. R. 204, followed. No objection to the qualification was taken until the day of polling, on which day notices were posted up in 5 out of the 12 polling booths (there being no evidence as to the other 7) containing a warning to the electors not to vote for the respondent. This was not a notice sufficient to entitle the relator to the seat.

Appeal allowed, and order made declaring election of respondent invalid and directing a new election, with costs to relator here and below.

WINCHESTER, MASTER.

MARCH 21ST, 1903.

CHAMBERS.

CHAMBRE v. GUNDY.

*Writ of Summons—Service out of Jurisdiction—Order Permitting—
Motion to Set aside—Waiver.*

Motion by defendant to set aside order allowing issue of writ of summons for service abroad, on the ground that plaintiff had no right of action on the judgment sued on.

A. D. Crooks, for defendant.

A. W. Briggs, for plaintiff.

THE MASTER held that it was too late for defendant to apply, after he had obtained an order discharging the certificate of lis pendens and allowing him to enter a conditional appearance. By entering an appearance and acting under that order, he waived any right that he had to move to set aside the order allowing the issue of the writ. Motion dismissed. Costs in the cause.

WINCHESTER, MASTER.

MARCH 21ST, 1903.

CHAMBERS.

CHAMBRE v. GUNDY.

Foreign Judgment — Action on — Motion for Summary Judgment — Defence.

Motion by plaintiff for summary judgment for the amount indorsed on the writ of summons, with interest and costs. Defendant shewed that the judgment sued on was obtained in Manitoba; that he was not then, and for some time before the date of the judgment had not been, a resident of Manitoba; and that he did not appear or submit to the jurisdiction of the Court in Manitoba.

A. W. Briggs, for plaintiff.

A. D. Crooks, for defendant.

THE MASTER held that the defence shewn was one which, if proved, would defeat the action under the various authorities cited in Holmsted & Langton, p. 151. Motion refused, with costs to defendant in any event.

WINCHESTER, MASTER.

MARCH 21ST, 1903.

CHAMBERS.

McKINNON v. RICHARDSON.

Particulars—Issue Directed to be Tried—Limiting Grounds of Attack on Conveyance—Further Particulars.

Motion by defendant for particulars of an issue directed to be tried.

H. D. Gamble, for defendant.

F. C. Cooke, for plaintiff.

THE MASTER.—The defendant has filed an affidavit in which he states that he has no knowledge of the grounds upon which the conveyance in question in the issue is attacked by plaintiff further than as stated on plaintiff's application which resulted in the issue being directed. The plaintiff is not willing to limit himself to these particulars, and on his

examination for discovery refused to give information as to his grounds for attacking the conveyance. An order will go limiting the plaintiff to the grounds set out in his material filed in support of such application and in a case of *Collins v. Cleveley*, with liberty to furnish further particulars within five days of the day of trial or as the trial Judge may permit. Costs in the issue.

STREET, J.

MARCH 21ST, 1903.

CHAMBERS.

HOBBS v. ANGLO-CANADIAN CONTRACT SYNDICATE (LIMITED.)

Trustees—Money in Bank—Disagreement of Two Trustees—Application by One for Relief by Payment into Court—Refusal of Other to Consent—Costs.

Appeal by plaintiffs from order of Master in Chambers. A sum of money was in the Canadian Bank of Commerce to the joint credit of defendant Lash and J. R. Shaw as trustees. Shaw is both a plaintiff and a defendant in the action. This money was claimed by plaintiffs and also by defendant company. Shaw refused to consent to the request of defendant Lash that the money should be withdrawn from the bank and paid into Court. After this refusal this action was brought. The plaintiffs claimed the money as against defendant company, and prayed that defendants Lash and Shaw might be ordered to pay it to them.

Defendant Lash applied for leave to pay the money into Court, and the Master in Chambers ordered that the trustees should be at liberty to pay the money into Court, and that upon such payment the name of defendant Lash should be struck out of the proceedings, and that he should be relieved from further liability in respect of the fund, and be at liberty to deduct his costs before payment into Court. The plaintiffs appealed from this order.

W. M. Douglas, K.C., for plaintiffs.

W. H. Blake, K.C., for defendant Lash.

G. F. Macdonnell, for Shaw.

STREET, J.—If the fund were under the sole control of defendant Lash, the order would have been right; but the fund is lying at the joint credit of himself and his co-trustee in the bank, and his co-trustee has always refused to join in removing it into Court, though without assigning any reason for his refusal. The order should have been refused, because it is an order that cannot be acted on. The money cannot be paid into Court without Shaw's consent to its withdrawal

from the bank. It is not usual to allow orders to go which can do no good, merely because they can do no harm. The order should be set aside; but, as it appears at present that the other parties are somewhat unreasonably insisting upon retaining Lash against his will as a party to proceedings in which he has no interest, the costs of the motion and appeal should be left to be dealt with at the trial.

FALCONBRIDGE, C.J.

MARCH 21ST, 1903.

CHAMBERS.

REX EX REL. MCLEOD v. BATHURST.

Municipal Elections—County Councillors — Proceeding to Set aside Election for Irregularity — Status of Relator — Acquiescence in Election—Voting for One Respondent.

Appeal by relator from order of Judge of County Court of Stormont, Dundas, and Glengarry, dismissing application to set aside election of respondents as county councillors for those united counties.

I. F. Hellmuth, K.C., for relator.

D. B. Maclellan, K.C., for respondents.

FALCONBRIDGE, C.J.—The objection to the status of the relator is well taken, and the Judge below has correctly distinguished *Regina ex rel. Coleman v. O'Hare*, 2 P. R. 18. The notices of motion here and below and the elaborate argument based thereon attacked the whole election as invalid by reason of alleged non-compliance with certain formalities which the relator said were imperative and obligatory. It was not alleged (except in the case of Bathurst) that there was anything working personal disqualification of the persons who were declared elected. Therefore, the relator, by voting for Finnan McDonald, who was in the same class with the other respondents, acquiesced in and became a party to the irregularity, and cannot now be heard to complain. The fact that Finnan McDonald, after service of the notice of motion on him, disclaimed office, seems to be nihil ad rem. The matter is to be dealt with on the state of facts existing when these proceedings were launched. *Regina ex rel. Pomeroy v. Watson*, 1 U. C. L. J. 48, *Regina v. Lofthouse*, L. R. 1 Q. B. 433, and *Regina ex rel. Harrison v. Bradburn*, 6 P. R. 308, referred to. Appeal dismissed without costs.

MARCH 21ST, 1903.

DIVISIONAL COURT.

MATTHEWS v. MARSH.

Promissory Note — Renewal — Action on against Accommodation Maker—Defence of Forgery—Alternative Claim on Original Note Previously Given up—Division Court—Jurisdiction—Amendment.

Appeal by defendants from a judgment of the 3rd Division Court in the district of Muskoka in favour of plaintiffs upon a promissory note for \$130 made by defendant and one McDonald in favour of plaintiffs. It appeared that defendant had made the note for the accommodation of McDonald in favour of plaintiffs, who knew that defendant was a surety only. When it became due, McDonald desired to renew it, and a renewal note was given him by plaintiffs to be signed, which he returned to plaintiffs with signatures to it purporting to be those of himself and defendant. Thereupon plaintiffs gave up to McDonald the original note stamped "paid." McDonald died insolvent. Plaintiffs tried to get the amount of the note from his estate, but failed, and then brought this action against defendant on the renewal note. Defendant swore he did not sign it. After two trials the plaintiffs were allowed to claim in the alternative upon the original note, and a verdict was given by the jury for plaintiffs on the original note.

The appeal was heard by STREET, J., BRITTON, J.

R. D. Gunn, K.C., for defendant.

C. E. Hewson, K.C., for plaintiffs.

STREET, J.—Plaintiffs' claim was within the jurisdiction of the Division Court, and the fact that he made another alternative claim, also within the jurisdiction, did not take it beyond the jurisdiction. The Judge had the right to amend the claim under Rule 4 of the Division Courts. The defendant was admittedly liable originally to plaintiffs upon the original note, and, if they were induced by the fraud of McDonald to give him up that note in exchange for another upon which defendant's signature was forged, plaintiffs' remedy upon the original note remained in equity, even though it may have been cancelled and given up: *Irwin v. Freeman*, 13 Gr. 465; *McIntyre v. McGregor*, 21 C. L. T. Occ. N. 75. The jury might well come to the conclusion that this fraud had been committed by McDonald on plaintiffs, and that plaintiffs were therefore entitled to recover upon the original note.

A witness (one McConachie) was entitled to look at his entries or those made under his direction in McDonald's books to refresh his memory, and the entries to which he referred were properly before the Court.

Appeal dismissed, but without costs, because the Judge below was very liberal to plaintiffs in his allowance of costs.

BRITTON, J., gave written reasons for coming to the same conclusion.

MARCH 21ST, 1903.

DIVISIONAL COURT.

HOPE v. PARROTT.

Bills of Sale—Cutting down to Chattel Mortgage—Failure to Renew—Landlord and Tenant—Distress for Rent—New Lease—Change in Tenants—Construction of Lease—Time for Payment of First Gale of Rent.

Appeal by plaintiff from judgment of LOUNT, J., dismissing action brought by the sheriff of Hastings, as assignee for the benefit of creditors of defendants Jacob Gay, George Gay, and Arthur Gay, to have it declared that certain bills of sale made by them were invalid as against plaintiff, and that a certain distress for rent made by defendant Parrott upon the goods of the Gays was improper because no rent was due, and that defendant Parrott might be ordered to pay over to plaintiff as assignee, certain moneys realized by him under the bills of sale and distress for rent.

The appeal was heard by STREET, J., BRITTON, J.

C. A. Masten, for plaintiff.

C. J. Holman, K.C., for defendant.

STREET, J.—The first question is whether the transaction of 8th May, 1899, between Parrott and the Gays, was a loan by Parrott to the Gays or a purchase by him from them. The trial Judge determined that an absolute sale was the real transaction. . . . Parrott did not become the purchaser of any of the property in question, and none of the elements of a sale to and purchase by him are to be found in what took place. The sum that was named in the bill of sale in each case had no relation to the value of the goods. Parrot did not inquire whether the goods being transferred to him were all in existence, nor what their value was. The sum fixed as the price was in one case what Parrott had paid one Andrews to relieve the Gays from the debt for which Andrews was suing them, and in the other case was the debt which they owed him for cattle and horses which he had sold them, and for rent due on their lease. Parrott said he would not take a chattel mortgage, and that he must have an absolute trans-

fer, but that does not alter the nature of the real transaction, which was not a bargain and sale, but a security given for a debt. There was undoubtedly an oral agreement by Parrott, upon the faith of which the bills of sale were made, that the Gays, who owned and were in possession of the goods subject to the charges on them, might redeem them by monthly payments of \$50 each, and this cuts down Parrott's interest to that of a mortgagee: *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1. The bills of sale, not having been renewed, should be declared void as against the plaintiff, representing the creditors of the Gays.

The remaining question was whether any rent was due to Parrott when he distrained on 27th September, 1901. Parrott claimed \$150 as due 3rd February, 1901, under a lease from him to the three defendants the Gays and one John Gay, for three years from 3rd February, 1898. This sum became due on 3rd February, 1901, and it was not paid; but on that day the lease expired and a new lease came into force from Parrott to the three co-defendants, John Gay having moved away. The distress was made more than six months after the expiration of the lease, and one of the tenants from whom the arrears were due had ceased to be in possession. In my opinion the landlord was not within 8 Anne ch. 14, and had no right to distrain for this \$150.

Parrott also distrained for \$200 due 1st April, 1901, under a lease dated 19th October, 1899, from him to his co-defendants for nine years from 3rd February, 1901. The rent was \$400 a year payable as follows: "\$200 on the 1st days of November and April in each and every year during the said term, and the last payment of \$200 three months before the lease expires." The question was whether the first payment of \$200 fell due on 1st November, 1901, or on 1st April, 1901. As \$400 was to be paid during each year of the tenancy, that could be carried into effect only by holding that the first payment fell due on 1st April, 1901. Parrott, therefore, had a right to distrain for this \$200.

As plaintiff did not entirely succeed, there should be no costs of appeal. Parrott should pay the costs of the action, as plaintiff has substantially succeeded in it. Parrott is entitled to \$200 of the proceeds of the goods in plaintiff's hands for the half year's rent under the second lease. Plaintiff may apply this on his costs of the action, and defendant Parrott is to pay the balance of costs, if any.

BRITTON, J., gave reasons in writing for coming to the same conclusion.

MARCH 21ST, 1903.

DIVISIONAL COURT.

SHUTTLEWORTH v. MCGILLIVRAY.

Husband and Wife—Gift of Chattels by Husband to Wife during Coverture—Seizure by Subsequent Execution Creditor of Husband in Conjugal Domicil.

Appeal by claimant in an interpleader issue from the judgment of the 1st Division Court in the county of Middlesex in favour of plaintiff, who was an execution creditor of defendant, and had seized under execution three pictures, which were claimed by defendant's wife. It appeared that between the years 1895 and 1898 defendant had purchased with his own money the pictures in question, and handed them to the claimant, his wife, telling her that he gave them to her. One of the pictures was afterwards framed by claimant in a frame given her by her mother. The three pictures were then hung up in the house occupied by the defendant and the claimant, and remained there until they were seized under plaintiff's execution.

The appeal was heard by STREET, J., BRITTON, J.

J. R. Meredith, for claimant.

J. H. Moss, for execution creditor.

STREET, J.—There was an actual present gift and delivery by the husband to the wife, sufficient to have constituted a complete gift and to pass the property as between two persons not husband and wife. Breton v. Woolven, 17 Ch. D. 416, and Shaeffer v. Dumble, 5 O. R. 716, were decided under the law before 1884. By the Act of that year (now R. S. O. ch. 163, sec. 3) a married woman's disability to receive and hold personal as well as real property by direct gift or transfer from her husband, was done away with. The pictures became her property by her husband's act. The subsequent possession was hers, although the house was occupied by her husband and herself: Ramsay v. Margrett, [1894] 2 Q. B. 18; Kelpin v. Rattey, [1892] 1 Q. B. 582. The true construction to be placed on sub-sec. 4 of sec. 5 of the Act, when read with sub-sec. 1 of sec. 3, is to place the wife precisely in the position of a feme sole with regard to property transferred to her by her husband during coverture; and therefore she can hold the property against his creditors unless the transfer is made for the purpose of defeating them; and there was no evidence of such a purpose in this case.

Appeal allowed with costs, and judgment to be entered for claimant with costs.

BRITTON, J., gave reasons in writing for coming to the same conclusion.

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FERGUSON, J.

MARCH 14TH, 1903.

CHAMBERS.

GOLDBERG v. DOHERTY MANUFACTURING CO.

Pleading — Malicious Prosecution — Defence in Bar — Acquittal of Plaintiff on Criminal Charge—Certificate of Trial Judge—Good Grounds for Prosecution.

Motion by plaintiff in an action for malicious prosecution to strike out a paragraph of the defence.

The plaintiff was arrested at the instance of defendants and tried before a Judge and jury upon a criminal charge and acquitted. At the request of counsel for the prosecution (the defendants) the Judge indorsed upon the indictment the following: "I hereby certify that in my opinion there was good reasonable and probable cause and ground for the institution of this prosecution."

The plaintiff having brought this action to recover damages alleged to have been sustained by reason of such prosecution, the defendants pleaded the certificate as a defence in bar.

The plaintiff moved to strike out this defence.

R. M. C. Toothe, London, and J. F. Faulds, London, for plaintiff.

F. F. Harper, London, for defendants.

FERGUSON, J., struck out the paragraph containing this defendant on the ground that it was not an answer to the action and was embarrassing. Costs in the cause.

MONCK, JUN. J., WENTWORTH.

MARCH 19TH, 1903.

FIRST DIVISION COURT, WENTWORTH.

HARVEY v. McPHERSON.

Division Courts—Jurisdiction—Splitting Cause of Action—Promissory Notes—Consolidation of Claim in Proof against Insolvent Estate.

The defendants purchased goods from the plaintiffs from time to time in continuous account, for some of which they

gave to the plaintiffs promissory notes, the balance being charged in open account.

The defendants made an assignment for the benefit of their creditors. The plaintiffs filed with the assignee an affidavit of claim, in the body of which they stated their claim to be \$2,554.41 "for merchandise." They received from the assignee 25 cents on the dollar and applied it generally on the whole claim.

They then instituted four actions against the defendants, one in the High Court for part of their claim, and three actions in the above Division Court on three individual promissory notes, not included in the High Court claim.

One of the Division Court actions was discontinued. In the remaining two Division Court actions the plaintiffs gave no credit for the dividend which they had received, but, after the evidence had been taken, they admitted that they should have done so.

P. D. Crerar, K.C., for defendants, contended that in bringing separate actions in the Division Court the plaintiffs had split their cause of action within the meaning of sec. 79 of the Division Courts Act.

Darcy Tate, for plaintiffs, cited *Real Estate Loan Co. v. Guardhouse*, 29 O. R. 602; *Re Franklin v. Owen*, 15 C. L. T. Occ. N. 105, 158, 185; *Clark v. Barber*, 26 O. R. 47.

MONCK, J.—I think the facts in the present case are distinguishable from those in the ruling cases, and that, had an action been brought in the High Court, there would have been but one count in the statement of claim.

The plaintiffs elected in the proof filed with the assignee to consider their claim a consolidated one for merchandise, and could so have declared in the High Court action. They accepted their dividend and applied it on the corpus of their claim.

I find, therefore, that in these several complaints the cause of action has been split within the meaning of sec. 79, and that this Court has no jurisdiction to try them.

WINCHESTER, MASTER.

MARCH 23RD, 1903.

CHAMBERS.

St. AMAND v. INTERSTATE CONSOLIDATED MINERAL CO.

Particulars—Master and Servant—Action under Workmen's Compensation Act—Defence of Statutes—Right of Plaintiff to Particulars.

Motion by plaintiff for particulars of a paragraph of the defence, Action for damages for injuries sustained by plain-

tiff while in defendants' service. The claim was made under the Workmen's Compensation for Injuries Act. The defendants denied negligence, and pleaded contributory negligence, and "the provisions of the Act to secure compensation to workmen in certain cases and the Mines Act, chapters 160 and 36 of the Revised Statutes of Ontario and amending Acts." Plaintiff asked particulars under the paragraph quoted, including the sections or parts of the Acts referred to in such paragraph.

George Bell, for plaintiff.

Casey Wood, for defendants.

THE MASTER held that plaintiff was entitled to particulars, for, even if the plea were "not guilty by statute," the section of the statute relied on should be given. *Taylor v. Grand Trunk R. W. Co.*, 2 O. L. R. 148, distinguished. *Pullen v. Snelus*, 40 L. T. N. S. 363, *Neil v. Park*, 10 P. R. 476, *McKay v. Cummings*, 6 O. R. 400, 403, and *Dodge v. Smith*, 1 O. L. R. 46, referred to. Order made for particulars. Costs in the cause.

BRITTON, J.

MARCH 23RD, 1903.

WEEKLY COURT.

BRADBURN v. EDINBURGH LIFE ASSURANCE CO.

Constitutional Law—Powers of Dominion Parliament—R. S. C. ch. 127, sec. 7—Interest—Rate of—Mortgage—Redemption—British Insurance Company Lending Money in Canada—Contract—Application of Law of Canada—Tender of Mortgage Money—Agents in Canada—Bill of Exchange.

Special case.

The plaintiffs were the executors of the will of the late Thomas Bradburn.

After previous negotiations between solicitors for the parties, Thomas Bradburn on the 9th October, 1895, made formal application to Kingstone, Wood, & Symons, solicitors for the defendants, for a loan of \$50,000 at 4½ per cent. for 10 or 15 years. The defendants had in Toronto, in addition to the solicitors named, an advisory committee. The application was referred to this committee, the committee recommended the loan, and the application and recommendation were forwarded by Kingstone, Wood, & Symons to the defendants' manager in Edinburgh, who submitted the matter to the board of directors of the defendants. The directors accepted the loan, and Thomas Bradburn was notified of such acceptance by cable.

The loan was made, the security therefor being:—

1st. A mortgage upon real estate in Ontario dated 25th January, 1896.

2nd. A mortgage upon leasehold dated 17th February, 1896, expressed to be made as collateral security for the mortgage upon the real estate.

3rd. A bond by Thomas Evans Bradburn, son of Thomas Bradburn, and now, as an executor, one of the plaintiffs in this action. This bond was in the penal sum of \$100,000, conditioned for the payment by Thomas Bradburn to the defendants of the money to become due on, and for the performance of the covenants in, the mortgage given by Thomas Bradburn on the realty.

The mortgage was for £10,273 19s. 6d sterling, with the proviso that it was to be void on payment at the office of the British Linen Company Bank in London, England, of the principal sum, with interest, also payable at that bank, at $4\frac{1}{2}$ per cent. per annum, as follows:—Principal on 15th January, 1906, and the interest half-yearly on 15th January and July in each year. All moneys to be paid in gold coin, or its equivalent in sterling money, if required. It was expressly provided in the mortgage that a bank draft on London, England, made in favour of the mortgagees, payable on presentation thereof, and delivered to the agent in Toronto aforesaid of the mortgagees, or mailed in the post office at Peterborough aforesaid, addressed to the said British Linen Company Bank, directed to be placed to the credit of the mortgagees, and duly registered, should, unless subsequently dishonoured, be considered as equivalent to the payment at the office of the said British Linen Company Bank in London, England, of a like amount to that named in said draft on the day of such delivery or mailing.

It was also provided that the mortgagor should have the right to pay on account of principal at the end of any year of the said term, the sum of £1,027 8s. 0d. (\$5,000), on condition of 4 months' previous notice of intention to make such payment.

Owing to loss by fire and the application of certain insurance money, the mortgage was reduced to £8,441 2s. 0d. sterling of principal, and at the time of the commencement of this suit stood at that amount.

In June, 1902, the executors (plaintiffs), for the purpose of winding up or "making an adjustment of the affairs of the estate," desired to pay off this mortgage. Negotiations followed. The defendants refused to accept the money on such terms as the plaintiffs offered, and the plaintiffs thereupon invoked R. S. C. ch. 127, sec. 7, claiming the right to

pay all this mortgage by paying the principal and all interest which had accrued, and three months' added interest. On the 3rd December, 1902, the plaintiffs formally tendered to Kingstone, Symons, & Kingstone, as solicitors and agents for the defendants, at their office, Toronto, a bank draft on London, England, for £8,683 5s. 0d., making up the amount as follows:—

For principal	£8,441	2	0
For interest to 3rd Dec., 1902....	146	14	9
For three months' interest by way of bonus	94	19	3
For costs of cablegram		9	0
	<hr/>		
	£8,683	5	0

This was refused.

It was admitted in this case and for the purposes of this action, that the figures were correct in amount on the basis stated in the offer.

The defendants set up the contentions (as stated in the special case):—

1. That sec. 7 of ch. 127, R. S. C., was ultra vires of the Parliament of Canada.

2. That, even if intra vires, it was not intended to apply to such mortgages as those in question in this action.

3. That the parties contracted with a view to the application of the law of England as to payment of the mortgage.

4. That, as defendants were a company authorized by an Imperial Act to lend money in Canada before the passing of the British North America Act, R. S. C. ch. 127, sec. 7, was not intended to and did not abrogate or diminish the powers previously granted to the defendants by their Imperial Act.

5. That the tender was not sufficient.

6. That the whole facts did not disclose any cause of action by the plaintiffs against the defendants.

A. P. Pousette, K.C., for plaintiffs.

F. W. Kingstone and D. T. Symons, for defendants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

The Minister of Justice for the Dominion was notified, but was not represented.

BRITTON, J. (after stating the facts).—The right to interest upon a contract for the same made in a Province is

certainly a civil right in the Province, but, if the Dominion alone has jurisdiction to legislate on the subject of interest, then the Province can deal with it as a civil right, only within the lines and subject to the limitations and restrictions laid down and imposed by Dominion legislation. [Reference to *Attorney-General v. Mercer*, 3 Cart. at p. 107.]

This is one of the cases in which the jurisdiction of the Province and the Dominion overlap. Lending money upon real estate or chattels and taking mortgages therefor is a question of property. Money is seldom lent except at interest, and, next to getting security for its repayment, interest is the most important thing connected with the loan, and interest is one of the subjects reserved for the Dominion. The Dominion Parliament has dealt with it in passing the statute under consideration, and there is the general presumption that the Legislature does not intend to exceed its jurisdiction.

It is argued for the defendants that the right of the Dominion to legislate is only as to rate, as to usury, leaving details and matters affecting contracts to the Province. On the other hand, it is argued by plaintiffs that the Dominion was intended to have and has power to deal with interest as to rate, and also when it shall and shall not be payable, even if in so dealing with it, in concrete instances, there is an apparent interference with property and civil rights.

The following cases and other cases establish that subjects, apparently within Provincial jurisdiction, may be dealt with, to a greater or less extent, by the Dominion, when necessary "to complete by ancillary provisions the effectual exercise of the powers given to the Dominion by the enumerated subjects in sec. 91:" *Lefroy*, p. 432: *Citizens Ins. Co. v. Parsons*, 4 S. C. R. 330; *Edgar v. Central Bank*, 15 A. R. 207; *Tennant v. Union Bank*, [1894] A. C. 31.

[Reference also to the following cases: *In re Parker*, 24 O. R. 373; *Lynch v. Canada North-West Land Co.*, 19 S. C. R. 204; *Regina v. Wason*, 17 A. R. 231.]

After the best consideration I can give to the matter, my conclusion, contrary to first impression, is, that sec. 7 is within the competence of the Dominion Parliament. In so holding I do not overlook the argument that, as a logical result, the Dominion can legislate to limit any contract to the shortest duration where interest is involved; nor do I overlook the decision in *Parsons v. Citizens Ins. Co.*, 7 App. Cas. 96, that "property and civil rights" in sec. 92 "include rights arising from contract, and are limited to such rights only as flow from the law." It is, however, one thing to legislate where the contract has sole reference to security for

money lent at interest, and quite a different thing to legislate in reference to other contracts where interest is only an incident. The question is simply as to the power. The wisdom of the Dominion Parliament is likely to be equal to that of the Province, and private rights in regard to interest are not less likely to be protected in the Dominion than in the Province. . . .

Section 7 is not restricted to such mortgages as are mentioned in sec. 3. By plain and unambiguous language it applies to every mortgage on real estate executed after the first day of July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage."

The plaintiffs claim to be entitled to the benefit of sec. 25 of R. S. O. ch. 205. . . . The words of this section are wide enough to apply to mortgages executed before the passing of that Act. There is no restraint as to its application such as is found in R. S. C. ch. 127. It is contended that this Ontario Act applies only to mortgages of loan corporations. I do not decide this.

Nothing turns on the company's Act of incorporation. The company has its head office in Edinburgh, and has the right to lend money in Canada. It is given the right, as a company, to do what an individual can do, but it can have no higher or other right.

It was argued that, as the money is payable in Scotland, the law governing the right to pay or to refuse payment must be the law of Scotland. . . . As the mortgage gives the mortgagor the option of paying in Canada, the contract may be considered as if made in Canada and to be performed here; the loan was, in fact, made here, upon property here. The law of Canada must govern in relation to the contract and its incidents.

Applying the principles laid down in *Hamlyn v. Tallis-ker Distillery*, [1894] A. C. 202, *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589, *Re Missouri S. S. Co.*, 42 Ch. D. 321, and *South African Breweries v. King*, [1899] 2 Ch. 173, it must be found that the contract was intended to be governed by the law of Canada. . . . Upon the whole case, I think the agency of Kingstone, Symons, & Kingstone is established, and that tender to them of the bill of exchange as payment of the mortgage money must be considered as good and sufficient. *Scully v. Tracey*, 21 O. R. 454, distinguished. . . .

As this is an application under the statute, *Brown v. Cole*, 14 Sim. 427, approved in *Bovill v. Endle*, [1896] 1 Ch. 648, does not apply to the extent of depriving plaintiffs of their right to have interest cease. Plaintiffs are entitled to a de-

declaration that no further interest shall be chargeable, payable, or recoverable after 3rd December, 1902, on the principal or interest due under the mortgage or upon the bond given as collateral security, so long as plaintiffs are ready to pay, and do pay, if defendants will accept, the sum of £8,683 5s. 0d. tendered.

If defendants shall hereafter be willing to accept the amount as tendered, and if upon notice thereof plaintiffs do not pay, the mortgage shall stand to be collected or enforced as if this action had not been brought. Defendants must pay the costs.

FALCONBRIDGE, C.J.

MARCH 23RD, 1903.

TRIAL.

SIPLE v. BLOW.

Easement—Right of Way—Maintenance of Gates—Pleading—Amendment.

Action for a declaration that plaintiff has a right to maintain gates sufficient for the passing of ordinary farm vehicles at the easterly and westerly entrance of a certain lane, and for an injunction restraining defendant from interfering with the maintenance of such gates.

S. G. McKay, Woodstock, and G. F. Mahon, Woodstock, for plaintiff.

E. D. Armour, K.C., and J. W. Mahon, Woodstock, for defendant.

FALCONBRIDGE, C.J.—The amendment proposed by plaintiff at the trial ought not to be allowed. It aimed at converting a claim of right to maintain gates at the easterly and westerly entrances of the lane (in effect, conceding defendant's right to use the lane) into a claim denying any right to defendant whatever. See *Newby v. Sharpe*, 8 Ch. D. 39; *Cargill v. Bower*, 10 Ch. D. 502; *Raleigh v. Goschen*, [1898] 1 Ch. 81. Defendant seems to have established his defence. There is a passage in *Washburn on Easements*, 4th ed., p. 255, which appears to favour the right to maintain gates, but no English authority is cited there, and it appears to be opposed to the law as stated in *Gale on Easements*, 7th ed., p. 536, and cases cited in note (e). Amendment refused, and action dismissed with costs. Thirty days' stay.

C.

MARCH 23RD, 1903.

TRIAL.

FERGUSON v. CORNELIUS.

and Child—Agreement for Maintenance of Parent—Payment Money — Recovery Back on Non-performance — Following into Land—Lien—Costs.

ion by a father (78 years old) against his daughter to \$800 paid by him to her in consideration of an agree- to maintain him, and to set aside the agreement, and er relief.

G. Porter, Belleville, for plaintiff.

B. Northrup, K.C., for defendant.

RD, C., gave judgment for plaintiff for re-payment of 0, less \$250, and for a charge on the land purchased ndant with the money, subject to the mortgage thereon. 50 to be payable back at the same time as the mort- the land, with interest meanwhile at five per cent. default in payment, the lands to be sold on summary ion to the Court, for which leave is reserved in this

Not a case for costs to either side: *Watson v. Wat-* Gr. 70.

C.

MARCH 23RD, 1903.

TRIAL.

TO GENERAL TRUSTS CORPORATION v.
CENTRAL ONTARIO R. W. CO.

RITCHIE v. BLACKSTOCK.

Judgment for Sale of—Rights of Public—Bondholders— gage—Enforcement by Sale—Statutory Authority to Sell— ict. ch. 24 (D.)—Vacating Consent Judgment—Judgment in ended Action Directing Sale—Form of Judgment—Reference sts—Fraud—Control of Railway Company—Status of Direc- Quorum—61 Vict. ch. 29 (D.)

he first action, in which a judgment was pronounced ent for the sale of the defendants' railway, an issue ected by an order of FALCONBRIDGE, C.J. (1 O. W. , upon a petition to vacate the judgment upon the of fraud and that the consent was not the real con- defendants.

second action was brought for an injunction to re- ne sale, to prevent defendants controlling the railway y, and for other relief.

The issue and the second action were tried together.

A. B. Aylesworth, K.C., and W. Barwick, K.C., for plaintiff Ritchie.

W. R. Riddell, K.C., T. P. Galt, and R. McKay, for defendants.

D. L. McCarthy, for plaintiffs the Toronto General Trusts Corporation.

BOYD, C.—The important question here discussed was, whether the judgment directing a sale of the railway was well founded in law.

The railway of defendants, a company of Provincial incorporation, has been declared to be a work for the general advantage of Canada, and has been since 1884 subject to the law of the Dominion (47 Vict. ch. 60, D.). In 1882 the company made the issue of first bonds, now sought to be enforced, under statutory powers, by which the lands, tolls, revenues, franchises, and other property, real and personal, of the company, were hypothecated, mortgaged, and pledged in security for the due payment of the amount of the bonds: 45 Vict. ch. 61, sec. 7 (O.), and R. S. O. 1877 ch. 165, sec. 9, sub-sec. 11. The form of the transaction was, that the issue of these mortgage bonds was secured by a deed of trust whereby was conveyed to the Toronto General Trusts Corporation the railway, its lands, rolling stock, present and future property and effects, franchises, and appurtenances, subject to the payment of the working expenses of the railway. This mortgage conveyance was subject to conditions before default and after default in payment. The condition now relevant is that which applies to default in payment of the principal of the bonds. Thereupon, upon request of the bondholders representing 75 per cent. in amount, the trustees shall elect and declare all the bonds to be due and shall take proceedings to enforce payment of the principal of the bonds as speedily as possible instead of operating the road and conducting the business thereof as is provided in case of default being made in the payment of interest. That is, if default is made in the principal moneys, the trustees are to intervene, not to take control of the road for the purpose of conducting the business, but are to take proceedings in the Courts to enforce payment. The suit has been rightly instituted under this requirement.

Now, the situation of the bondholder as chargee of the land of the railway company was first considered in this Province by Spragge, V.-C., in *Galt v. Erie, etc.*, R. W. Co., 14 Gr. 499. He pointed out that the cases of mortgagees of

s in England do not apply, as there only the "under-
 ' is involved, which is something exclusive of the
 p. 501. . . . And he concludes, for the same rea-
 rich guided Esten, V.-C., in an earlier case respecting
 ts of judgment creditors of a railway company (Peto
 and R. W. Co., 9 Gr. 455), that the railway should not
 by the Court because the vendee could not exercise
 nchise, i.e., conduct and operate the railway. . . .
 ummond v. Eastern R. W. Co., 24 L. C. Jur. 276, and
 n v. La Banque Nationale, M. L. R. 2 Q. B. 491, re-
 to.]

statute passed by the Parliament of Canada in 1883
 ct. ch. 24) applies to this road and to these bonds,
 they were made the year before. It provides for the
 a railway to a purchaser not having corporate powers,
 (1) the sale is under the provisions of any deed of mort-
 (2) at the instance of the holders of any mortgage
 r debentures for the payment of which any charge has
 eated thereon, or (3) under any other lawful proceed-
 This enactment does not enlarge the contract in the
 giving new rights, but is of a remedial nature, which
 ll be applied for the benefit of existing engagements.
 ect of a judicial sale of the road is thus not to work
 tion to the concern, but to continue its operation by a
 ner under sanction of Government license or legisla-
 thority. See *Shepley v. Atlantic R. R. Co.*, 55 Me.
 d *Bickford v. Grand Trunk R. W. Co.*, 1 S. C. R. at

se sections were commented on by Lord Watson in
 l v. Wickham, 13 App. Cas. 476, as clearly shewing
 e Dominion Parliament has recognized the rule that
 ay may be taken in execution and sold in ordinary
 of law. The reason of this decision rests on the fact
 he Legislature had made provision for the transfer
 undertaking:" per Lord Watson in *Grey v. Manitoba*,
 W. Co., *Shorthand Notes in Privy Council*, p. 14. . . .
 rief, the legislation permits a mortgage of the lands
 company. The right of such a mortgagee is to en-
 is security by a sale of the land. There is now no
 availing right on the part of the public, based upon the
 of the Legislature, to prevent a sale being had; for,
 d after the sale, the road will still run its course and
 e public as when in the hands of the original cor-
 n.

these reasons . . . I find no error in the judg-
 sell the road. But, because of the importance of the
 and as a favour to the company, I vacate the consent

judgment and allow an amendment of the pleadings to set up this defence in law as of the 20th March, and I now give judgment upon that amended record directing a sale of the road. The relief can only be granted upon payment of all costs occasioned by the application of the company to be allowed to defend.

As to the form of the judgment, it should be referred to the Master to inquire who are the debenture holders and what is due to each of them and to sell the road to satisfy their claims. If there is undue delay in taking the accounts, leave to apply to expedite the sale. The rival bondholders to have the right to attend on settling advertisement and conditions of sale and to have leave to bid—though this is, perhaps, not necessary to be mentioned in the judgment. The costs heretofore occasioned by advertising the immediate sale to be paid by the company as a part of the costs above referred to.

So far as the attack made upon the proceedings is based upon fraud or other like ground, it fails, and I dismiss that branch of the litigation with costs to be paid by Ritchie.

There is another branch of contestation involving the status of directors and as to who is the solicitor of the railway company. Having regard to this judgment, and the fact that the receiver already appointed will continue in possession till the sale, and is a person satisfactory to all the litigants, it does not appear to me essential to make nice critical discrimination as to legal rights in the present directorate. The voice of the shareholders has been heard, and the large majority are in favour of what I may call the Ritchie nominees, and they ask for this amendment.

The normal body of directors of the company is 7, of whom 4 form a quorum. By the resignation of the 4 directors whose places became vacant on the acquisition of Payne's interest by Ritchie, there were but three left—less than a quorum. According to *Newhaven v. Newhaven*, 30 Ch. D. 350, these, being less than a quorum, were unable to transact any business or even to fill the vacancies.

Under a direction that "the continuing directors might act notwithstanding any vacancy in their body," it was held that less than a quorum might validly act: *Re Ross*, [1901] 1 Ch. 117. That is a more helpful provision than is found in the Railway Act providing for vacancies to be filled by death, etc. But, if such appointment is not made, such death, absence, or resignation shall not invalidate the acts of the remaining directors: 61 Vict. ch. 29, sec. 51. . . . But should not those who remain be sufficient to form a quorum? Section 54 says that the act of a majority of a quorum shall be deemed the act of the directors. And sec.

the directors at any meeting at which not less than a majority are present shall be competent to use and exercise all the powers vested in the directors. This latter clause seems to require at least a quorum to exist and before effective action can be taken. My strong impression is, that neither set of directors can claim to represent the company as a matter of legal right; but it is not, in order to do substantial justice, to decide thus. In this contest for the controlling directorate, I make no claim and give no costs.

I have not failed to consider, in exercising my discretion, that Ritchie has expended time, energy, and resources in the development of this enterprise, and he should have a fair chance of obtaining the best return that can be had from the undertaking.

If the plaintiffs the trustees cannot collect costs now allowed in any other way, they should receive these costs from the assets of the railway company.

MARCH 23RD, 1903.

DIVISIONAL COURT.

HAND v. SUTHERLAND.

Books—Running Account—Action for Balance —Questions of Fact—Appeal.

Appeal by defendant from judgment of District Court in favour of plaintiff for \$481.34. Plaintiff was a wholesale butcher and defendant a retail butcher, both at St. Louis. Marie. They had formerly been in partnership, dissolved, and for a year or two before August, 1900, to the latter part of 1901, they had been on friendly terms and had carried on large transactions with one another in a spirit of mutual trust and confidence. They bought and sold to one another large quantities of meat, frequently borrowed from one another and exchanged meat as they needed it. This action was brought for a balance alleged to be due to plaintiff in respect of transactions between the parties.

W. H. Raney, for defendant.

W. H. Douglas, K.C., for plaintiff.

The COURT (STREET, J., BRITTON, J.) held that, as the questions involved were purely questions of fact, there were no grounds upon which they could interfere with the conclusion of the Judge of the District Court. Appeal dismissed with costs.

WINCHESTER, MASTER.

MARCH 24TH, 1903.

BOYD, C.

MARCH 27TH, 1903.

CHAMBERS.

BERTRAM v. PURSLEY.

*Venue—Change of—Cause of Action—Residence of Parties—Rule 529
—Expense—Undertaking.*

Motion by defendant to change venue from Brantford to Simcoe in an action for slander. Six distinct causes of action were alleged, five of which arose in the county of Norfolk, and one in the city of Brantford. The parties lived in the county of Norfolk.

Rule 529 provides that where the cause of action arose and the parties reside in the same county, the place to be named as the place of trial shall be the county town of that county, unless otherwise ordered by the Court or a Judge upon the application of either party.

A. G. Slaght, for defendant.

L. F. Heyd, K.C., for plaintiff.

THE MASTER held that, had the venue been originally laid at Simcoe, the preponderance of convenience attempted to be shewn upon this application in favour of Brantford would not have been sufficient to warrant the change; and, under all the circumstances of this case, the venue should be changed to Simcoe. Order accordingly. Costs in the cause. Only necessary affidavits to be allowed for on taxation.

Upon appeal from this order, argued by the same counsel:—

BOYD, C., affirmed the order, upon defendant undertaking to pay the extra expense, if any, of a trial at Simcoe.

BOYD, C.

MARCH 24TH, 1903.

TRIAL.

MANNING v. SMALL.

*Contract—Services as Agent—Promise of Employment—Recovery of
Money for Breach.*

Action to recover payment for services under a contract.

S. H. Bradford and B. E. Swayzie, for plaintiff.

W. Barwick, K.C., and H. J. Wright, for defendant.

BOYD, C.—It is sufficiently proved that plaintiff worked in the interests of the defendant with a view of procuring

lease of the Grand Opera House in the city of Toronto the plaintiff's uncle, under promise that, if the plaintiff secured, the defendant would give the plaintiff compensation to the value of at least \$600 by certain employment. Negotiations were going on for a considerable time, and it is no answer to the claim that during the time plaintiff was in the employment of defendant the work of intervention at Toronto was quite distinct from his employment at Guelph, and it was engaged in on the same promise of being compensated for. Deducting plaintiff's earnings made in other employment, there should be judgment in his favour for \$450 and costs.

MARCH 24TH, 1903.

TRIAL.

McMAHON v. COYLE.

Land and Tenant—Breach of Covenant in Lease—Assignment and Re-entry for — Formal Execution of Deed of Assignment after Action.

Plaintiff to recover possession of land tried with a jury at

Porter, Belleville, for plaintiff.

Clute, K.C., and W. S. Morden, Belleville, for de-

C.—The jury found that there was no consent of plaintiff to the transfer of the lease from defendant Coyle to defendant. It was argued that the right to re-enter was only to the breach of an affirmative covenant, but not to a negative covenant, i.e., one not to do a particular thing. In my opinion there is a right of re-entry on failure to comply with the covenant. Under the lease in question, made under the Short Forms Act, the statutory right of re-entry in case of breach or non-performance of any of the covenants or agreements therein contained, of which one is the covenant not to assign without leave. As held by Wilson, C.J., in *Hospital Trustees v. Denham*, 31 C. P. 203, it applies as well of omission as of commission, and extends therefore to the assignment without license. There is a plain breach of the covenant not to assign without leave. The right to re-enter follows: *Eastern Trust Co. v. Eastern Trust Co.* [1900] 1 Q. B. 835. It is immaterial that the docu-

ment shewing the transfer was not executed until after action brought, as the agreement was made, all terms settled, and transfer of possession given. Judgment for plaintiff for possession and for \$344.50 damages and costs of action.

MARCH 24TH, 1903.

DIVISIONAL COURT.

METALLIC ROOFING CO. OF CANADA v. LOCAL
UNION NO. 30, AMALGAMATED SHEET
METAL WORKERS.

Trade Union—Combination of Workmen to Injure Business of Employers—Evidence of—Interim Injunction.

Appeal by defendants from an order in the nature of an interim injunction made by MEREDITH, C.J., on the 2nd October, 1902, restraining defendants, their officers, servants, and agents, from using any threats or making any communications in writing or otherwise to plaintiffs' customers, or any of them, to cease dealing with plaintiffs. The plaintiffs were a company manufacturing metallic roofing and other metal goods, and defendants were a trades union, and individual members of it. Plaintiffs failed to agree with the union as to the terms upon which their employees should work for them, and they fell under the displeasure of the union. The union thereupon, with the object of forcing plaintiffs to come to their terms, notified plaintiffs' customers that the men employed by the customers would refuse after a certain date to handle any of the goods manufactured by plaintiffs, because plaintiffs were unfair to organized labour.

J. G. O'Donoghue, for defendants.

W. N. Tilley, for plaintiffs.

THE COURT (STREET, BRITTON, JJ.) held that there was sufficient evidence of concerted action on the part of defendants to make out a prima facie case of combination on their part, and the object of the notices might properly be assumed, for the purposes of the motion, to have been to injure plaintiffs' trade to such an extent that they would be forced to accede to the terms proposed by defendants unless they preferred to stand out and be ruined. All these matters may appear differently at the trial, which should not be prejudiced by a discussion of them now. The evidence upon which

, C.J., acted was a sufficient basis for an interlocutory judgment. *Quinn v. Leathem*, [1901] A. C. 495, 10 App. Cas. 101. Appeal dismissed with costs.

MARCH 25TH, 1903.

CHAMBERS.

ROCKHOLD v. GRAND TRUNK R. W. Co.

*Apportionment—Widow and Infant Children of Person
in Railway Accident—Compensation—Payment into Court
for Provision for Widow.*

by plaintiffs for judgment in terms of a settlement between the parties by which defendants agreed to pay the plaintiff as compensation for the death of the husband the adult plaintiff and the father of the infant

Osborne, Hamilton, for plaintiffs.

McCarthy, for defendants.

Harcourt, official guardian, approved of the settlement on behalf of the infant plaintiffs, and asked the Court to allow the \$4,800 between the adult and infant plain-

, C.—In case of death by accident the damages are apportioned by the jury among those entitled to share them. See R. S. O. ch. 135. But in case the matter goes before a jury, but a sufficient sum is paid into Court to satisfy the action, then it may be brought summarily before the Judge to make just distribution. The fact should not be overlooked in this case that some provision has been made for the widow by an insurance of \$1,000 in her favour. In this case to allow the widow one-fourth of the sum, that is, \$1,200, and to each of the four infants \$900. See *Hardreson*, 36 L. T. N. S. 847, and *Bulmer* v. *Grand Trunk*, 25 Ch. D. 413, referred to. Judgment as agreed to, apportioning the money as stated. The infants' costs to be paid into Court, and \$200 a year to be paid out of the fund to the widow for their maintenance for three

WINCHESTER, MASTER.

MARCH 27TH, 1903.

CHAMBERS.

RE SOLICITOR.

Solicitor—Application for Delivery of Bill—Security for Costs—Applicant out of Jurisdiction—Solicitor Setting up Champertous Agreement—Præcipe Order—Setting aside—Order for Delivery of Bill.

Application by John Allen to set aside a præcipe order requiring him to give security for the solicitor's costs of an application for delivery and taxation of bills of costs. The original application for the order for delivery and taxation was brought on at the same time. The applicant resided at the time of the application in the United States of America. He employed the solicitor to act for him in connection with certain litigation relating to land in the county of York, at a time when he (the applicant) lived in this Province. The solicitor stated that in 1897 the applicant was indebted to him in \$400 costs and disbursements in a High Court action, and sundry small book accounts, and that there was then an action of ejectment pending between the applicant and his son to obtain possession of the land mentioned; that the applicant having no means to pay the costs or to furnish funds to carry on the litigation, it was agreed between the solicitor and the applicant that the land should be leased and the rents paid to the solicitor in full of his costs, etc.

T. H. Lloyd, Newmarket, for applicant.

J. W. McCullough, for solicitor.

THE MASTER.—The solicitor has brought himself, if not within the decisions as to champerty and maintenance, perilously nearly so. *Wood v. Downes*, 18 Ves. 120, *James v. Kerr*, 40 Ch. D. 449, *Hall v. Hallett*, 1 Cox (Ch.) 135, *Carter v. Palmer*, 8 Cl. & F. 705, *Ex p. James*, 8 Ves. 337, *Luddy's Trustee v. Praed*, 33 Ch. D. 500, *Robertson v. Furness*, 43 U. C. R. 143, *Locking v. Halsted*, 16 O. R. 32, *London Mutual Fire Ins. Co. v. Jacob*, 16 A. R. 392, and authorities cited in the last case, referred to. The transactions between the solicitor and his client are, upon the solicitor's own admissions, of such a character as to warrant the client in asking the Court to investigate them. The solicitor was entitled under Rule 1199 to a præcipe order for security for costs, as it appeared on the face of the notice of motion that the applicant did not live in the jurisdiction. But the facts of this case entitle the applicant to have the præcipe order set aside: *Sample v. McLaughlin*, 17 P. R. 490. Order made

de præcipe order and directing delivery by the bills of costs within two weeks. Applicant to have the applications against the solicitor.

MARCH 27TH, 1903.

CHAMBERS.

HALLIDAY v. RUTHERFORD.

*of—Action in High Court—Payment of \$300 into Court—
as to Creditors' Claims — Certificate for County Court
Refusal of Set-off.*

Master in Chambers, having summarily determined a sum of \$300 paid into the High Court (1 O. W. afterwards gave a certificate shewing that he had plaintiff was entitled to costs on the scale of the Court without any set-off to defendant. Defendant set aside the certificate.

MacGregor, for defendant.

Cooke, for plaintiff.

C.—By the Law Reform Act of 1868 the equity jurisdiction of the County Court was abolished, and provision made for carrying on such cases as were of minor importance in the Court of Chancery, with provision for a lower jurisdiction—such as would be appropriate for County Court equity action. This lower jurisdiction of Equity was retained in the Superior Court till 1896, when equitable jurisdiction was restored to the County Court (Vict. ch. 19, sec. 3 (O.))

It has remained from this state of equitable jurisdiction between 1868 and 1896, which has been used by the Master in this case. He has awarded costs to plaintiff on the County Court scale. That per se imports taxation on the County Court tariff, but excludes the allowance for set-off of costs. The Master's intention in this case was to award the costs that the plaintiff should tax County Court without any diminution. That has been made good by the supplementary certificate, which is now moved for.

The Master is competent for the Master so to make plain his intention as to costs, but his meaning was plain enough without the supplementary certificate.

From discretion, less was given to plaintiff than on the County Court scale he might have claimed. The County Court has jurisdiction where relief is sought in respect of any

matter whatsoever in which the subject matter involved does not exceed \$200. Upon the affidavit it appears that plaintiff's solicitor on 30th October, 1902, held in hand creditors' claims to the extent of \$211.49 unsatisfied. Of this, \$11 is to be deducted for excess claimed by plaintiff, but to this there is to be added the claim of the creditor Geralamy, fixed in the Master's order at \$36.92. By that order creditors' claims were directed to be paid to the extent of \$189.47, and it is said that the others, which were small claims, were paid pending litigation. This appears also from the fact that the Master discharged the lien only upon payment of \$300 into Court.

The Master thus did not give the plaintiff larger costs than he was entitled to when fixing the scale as that of a County Court action. I dismiss this application with costs.

BOYD, C.

MARCH 27TH, 1903.

WEEKLY COURT.

YOUNGSON v. STEWART.

Costs—Partnership Action—General Costs—Surcharge — Costs between Defendants.

A partnership action. Motion by defendant Hopkins for judgment on further directions and for costs against defendant Stewart.

H. H. Robertson, Hamilton, for defendant Hopkins.

T. Hobson, Hamilton, for defendant Stewart.

BOYD, C.—The defendant Stewart should have the general costs of the cause from plaintiff, who began the action with a claim that Stewart had in hand assets of the firm sufficient to pay all the debts and furnish a surplus divisible among the partners. In the result it appeared that there were no assets, and that Stewart was out of pocket to the extent of \$480. But as to certain costs in the Master's office, and upon his certificate, so much of the costs in his office as arose upon the surcharge of Hopkins in respect of the sum of \$465 retained by Stewart should be taxed to Hopkins and paid by Stewart. The result of the action is in favour of Hopkins and Stewart, but plaintiff is a person of no substance, and there are no moneys out of which to pay them what the partnership owes them respectively, and none to

The only direction that can be given is, that contribute ratably to pay the other and to pay Norvell v. Norvell, L. R. 7 Eq. 537. That, in giving each pay his own costs, except as to the costs of the proceedings in the Master's office as are apportioned to be paid by Stewart.

MARCH 28TH, 1903.

WEEKLY COURT.

EX-GRATIA v. TORONTO GENERAL TRUSTS CORPORATION.

Case in Action to Recover Succession Duty—Costs Payable by Crown where Unsuccessful.

for a direction as to the costs of action and special liability of estate of Hugh Ryan, deceased, for duty, in which judgment was given by the Chancellor 11th December, 1902 (1 O. W. R. 807.).

Middleton, for plaintiff.

Knock, for the trustees.

Malconbridge, for the adult beneficiaries.

C.—In litigation under the Succession Duty Act submitted to the High Court there is power expressly given with the costs: 62 Vict. (2) ch. 9, secs. 1 and 3. Such jurisdiction is conferred as is exercised by the ordinary controversies between parties. The rule which formerly prevailed, that the Crown (and the General acting for the Crown) neither asks nor pays is practically suspended. In petitions of right costs are at the discretion of the Court (Rule 934), and so in cases of appeals being quashed or affirmed (Rules of 7th June, 1902), under the general head of "Crown Actions," "in proceedings before any Court . . . in or on behalf of the Crown . . . by virtue of the Act relating to the public revenue," costs may be awarded as in actions between subject and subject (Rules 934 and 935).

The jurisdiction to give costs in a special case, as provided for in terms, is conceded to exist under the Special Act 13 & 14 Vict. ch. 35, sec. 32, by which the "special cases" are in the discretion of the Court—incorporated into our law by the Judicature Act,

R. S. O. ch. 51. The defendants were ready to pay or had paid all the duty which could be exacted, and the claim of the public officer for more failed. A burden is laid upon private estates by the Succession Duty Act; it should not be increased by the expense of litigation unless something exceptional has arisen. Although the matter turned upon the construction of the will, it is not a case for throwing the costs on the estate of the testator, the scheme of the will being well defined and the language used being apt for giving effect to the testator's intentions. The costs should be paid by the unsuccessful party (the Crown or the Attorney-General), but only one set of costs should be taxed to defendants.

MARCH 28TH, 1903.

DIVISIONAL COURT.

NOLAN v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Life Insurance—Action on Policy—Condition as to Award—Application to Stay Proceedings.

Appeal by plaintiff from order of MEREDITH, J. (2 O. W. R. 98), reversing order of Master in Chambers (1 O. W. R. 777), refusing to stay proceedings in this action until the amount due plaintiff and the other matters in dispute shall have been ascertained by arbitration in the manner provided by the policy of insurance sued on.

S. A. Jones, for plaintiff.

H. Cassels, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The case is governed by *Spurrier v. La Cloche*, [1902] A. C. 446, and no action lies, nor does the amount payable under the policy become due, until the determination of the arbitrators to be appointed under the agreement to refer contained in condition No. 15. That is an agreement to refer under sec. 6 of R. S. O. ch. 62, although plaintiff has not signed it; she cannot claim under the policy without assenting to its terms: *Baker v. Yorkshire Fire and Life Ins. Co.*, 92 L. T. 111. Condition 15 does not appear to be in contravention of sec. 80 of R. S. O. ch. 203. It is

condition which necessarily extends the time of payment beyond sixty days after proofs of the claim have been filed, for it may well be that the amount may be ascertained within the period mentioned. Appeal dismissed with

MARCH 28TH, 1903.

DIVISIONAL COURT.

TON AND KNOWLES LOOM WORKS v.
HOFFMAN.

*Breach of Warranty on Sale of Machine—Loss of Profits
—Defect in Machine—Property not Passing.*

appeal by defendants from judgment of MACMAHON, J. (R. 717), allowing plaintiffs' claim and dismissing defendants' counterclaim. Action to recover the price of a loom and fittings which plaintiffs agreed to manufacture and deliver to defendants for \$662.63, payable one-third, one-quarter on 1st December, 1900, and one-sixth on 1st April, 1901; the property to remain in plaintiffs until paid for. Counterclaim for damages for loss of profits on reason of the defective condition of the machine and for the time and labour expended in endeavouring to get the work done, for the material it spoiled, and for the services of an expert, etc.

McPherson, K.C., for defendants.

Edney Smith, K.C., for plaintiffs.

Judgment of the Court (FALCONBRIDGE, C.J., and BRITTON, J.) was delivered by

BRITTON, J.—The plaintiffs agreed either that the loom and fittings should be shipped to defendants on or about 1st December, 1900, or else that it should be shipped within a reasonable time from the giving of the order, and, looking at the circumstances, it is not unreasonable to hold that the loom and fittings have been shipped so that defendants might, had the loom been complete and properly constructed, have been able to work profitably upon it by the 1st August. But plaintiffs in fact supplied all the fittings they had agreed to supply, and they never supplied a loom properly constructed to do the work required of it by defendants, and so the plaintiffs well knew the machine had been ordered.

There was an implied, if not an express, warranty that it should be fit for the purpose of making web similar to a piece furnished to plaintiffs by defendants. When a plaintiff sues for the price of a machine, a defendant may rely upon a breach of warranty to reduce the claim, even although the property has not passed to him: *Cull v. Roberts*, 28 O. R. 591. The plaintiffs cannot say that, although the machine sent by them was a defective one, yet a competent mechanic could have set it right in a few days, the fact being that a competent mechanic was not to be found in the country, and one had to be imported from Buffalo for the purpose. Defendants used their best endeavours, in good faith, from the time the loom reached them, to make it work; it would not work owing to inherent faults which they used every reasonable means to discover and correct. It was plaintiffs' fault that defendants did not, for a considerable time, earn the profits from the use of the machine which plaintiffs knew when it was ordered they expected to earn, and they are liable to make these profits good: *Waters v. Towers*, 8 Ex. 401; *Cory v. Thames Iron Works*, L. R. 3 Q. B. 181; *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670. Defendants were justified for at least six weeks in waiting for the parts which plaintiffs had not sent, and in looking about them for the proper means of setting the defects right, and should be allowed \$180 for loss of profits, in addition to the \$69 allowed them by the judgment appealed against. Judgment reduced from \$495.63 to \$315.63, and the latter sum to bear interest from 1st October, 1900, and defendants to have the costs of this appeal set off against plaintiffs' debt and costs.

MARCH 28TH, 1903.

DIVISIONAL COURT.

RUTHERFORD v. WARBRICK.

*Deed—Conveyance of Land—Cutting down to Mortgage—Redemption
—Condition—Revival of Debt Thrown off—Costs.*

Appeal by plaintiff, Mary A. R. Rutherford, wife of Henry A. Rutherford, from judgment of BOYD, C., in a redemption action, allowing plaintiff to redeem, but directing that she should be charged in taking the accounts with a certain sum of \$627.05 beyond the amount she contended she ought to pay. The Chancellor held that the conveyance from plaintiff to defendant, though in form absolute, was intended to operate only as a security, and that defendant was subject to be redeemed.

R. Riddell, K.C., and G. Grant, for plaintiff.

T. Lee, for defendant.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRIT-
J.) did not differ from the conclusion of fact of the
teller. If the appellant had not been a debtor to the
dant, it would probably have been his duty to see that
ad proper advice: see *Cobbett v. Brock*, 20 Beav. 324:
such duty was imposed on him when she and her hus-
were both debtors. All the circumstances are incon-
t with defendant's contention that the conveyance to
represented a purchase by him, and that they were only
tent with the theory that it was intended as a security,
at plaintiff had made out a satisfactory case for cutting
conveyance down to a security.

On 5th April, 1902, defendant's debt then standing at
\$627.05 over and above the \$2,000 secured by the transfer
property, he agreed to accept \$1,000 in satisfaction of
and threw off the \$627.05, upon being paid the \$1,000.
In these circumstances it cannot be made a condition of
plaintiff's right to redeem that the \$627.05 should be revived
against her.

Appeal allowed with costs, and judgment varied by de-
claring plaintiff entitled to redeem on payment of \$2,000
interest, and plaintiff should, according to the well
known rule in redemption cases where the right to redeem is
lost, have her costs to the hearing inclusive; such costs
to be set off against defendant's debt. Reference to local
agents at Brampton to settle amount and tax costs. Further
costs and subsequent costs reserved.

ST, J.

MARCH 20TH, 1903.

CHAMBERS.

McKINNON v. RICHARDSON.

*Examination of Party—Attendance by Consent at Place
of Party's Own County — Further Examination — Place for
Holding.*

The defendant's solicitor, having taken out an appoint-
ment for the examination for discovery of one of the plain-
tiffs at Guelph, undertook, at the request of the plaintiffs'
solicitor, to produce the defendant at Guelph for his ex-
amination for discovery upon payment of his proper conduct
costs, although the defendant was entitled to be examined

in Orangeville, his county town. The conduct money was paid, and, upon the examination of the defendant at Guelph, it turned out that he knew very little personally of the matters in issue, and, no notice to produce having been served, nor any request made for the production of documents, no documents were produced on the examination. The plaintiffs' solicitor then asked to have the examination adjourned to be continued in Guelph, and asked that the defendant, in the meantime, procure information from his agent, which would enable him to answer the questions put to him upon his examination for discovery. The examination was adjourned accordingly. The defendant did not appear upon the adjourned examination, but his solicitor attended and offered to produce him for examination at Orangeville, upon receiving his proper conduct money.

The plaintiff moved to commit the defendant for not attending upon the adjourned examination at Guelph.

F. C. Cooke, for plaintiffs.

H. D. Gamble, for defendant.

STREET, J., held that the defendant was not bound to go back to Guelph for examination for discovery; that his solicitor, having produced him there in the first instance, had fulfilled his obligation; and that, if the plaintiffs desired any further examination, they should pay the proper conduct money and examine the defendant at Orangeville.

Order made for examination at Orangeville, upon payment of the proper conduct money. Costs in the cause.

THE MARIO WEEKLY REPORTER.

(TO AND INCLUDING APRIL 4TH, 1903.)

I. TORONTO, APRIL 9, 1903.

No. 13.

MASTER, MASTER.

MARCH 30TH, 1903.

CHAMBERS.

DIAN BANK OF COMMERCE v. TENNANT.

*Summons—Renewal of—Efforts to Ascertain Whereabouts of
Defendant—Statute of Limitations—Order for Renewal—Appli-
cation to Set aside—Discretion.*

Application by defendant to set aside ex parte order for renewal of summons, the renewed writ, and the service thereof on defendant. The action was brought to recover the amount due upon two promissory notes made by defendant, \$800, dated 12th June, 1895, payable four months after date, the other for \$210, dated 23rd August, 1895, payable six months after date, and interest on both sums. The action was begun by writ of summons issued 11th October, 1901. The writ not having been served, the plaintiffs on 11th October, 1902, obtained ex parte from the local Master of the court the order renewing the writ, upon an affidavit made by a clerk in the office of plaintiffs' solicitors, stating "that the plaintiffs have been made to ascertain the whereabouts of the defendant, but that, so far, such inquiries have been without success, and that at the time of making the notes sued on the defendant resided in the city of Toronto, but that plaintiffs have been unable to locate the said defendant." The writ was renewed and the renewed writ was served on defendant at the City of Toronto on 7th March, 1903. Upon this application the defendant filed an affidavit setting forth that he had lived in Toronto continuously since the notes were made and giving his home and office addresses, which appeared in the City Directory for 1901 and 1902, and that from 11th October, 1901, to 11th October, 1902, he could have been found in Toronto at his office or house. In answer plaintiffs filed an affidavit of their manager at Sarnia and a clerk formerly employed by their solicitors. These affidavits shewed that the instructions for suit had been given inquiries were made of the defendant and that the payees of the notes informed the plaintiffs that defendant had left Toronto and was living in Sarnia, but that, although further inquiries were made, the plaintiffs were unable to ascertain his whereabouts until February 1903.

J. H. Tennant, for defendant.

D. L. McCarthy, for plaintiffs.

THE MASTER.—While there can be no doubt as to the residence of defendant being in Toronto during the period after the issue of the writ, and that he could have been readily served at any time after its issue, and while the Court regards with jealousy applications for extending the time for service, especially where, but for the existence of the writ, the ordinary period of limitation would have expired, yet, the plaintiffs not having withheld any evidence from the local Master in applying for the ex parte order, and having explained their efforts to ascertain the whereabouts of defendant to his satisfaction, his order should not be set aside. *Howland v. Dominion Bank*, 15 P. R. 56, and *Mair v. Cameron*, 18 P. R. 484, distinguished. Defendant having had good reason to make the application, costs to be costs in the cause.

MARCH 30TH, 1903.

DIVISIONAL COURT. .

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

Contempt of Court—Motion to Stay Appeal by Defendants in Contempt—Disobedience to Injunction—Unincorporated Association—Body Improperly Served with Process—Costs.

Motion by plaintiff to stay defendants' appeal from order of MEREDITH, J. (ante 99), affirming order of Master in Chambers (ante 26) dismissing a motion by defendants to set aside an order for service of the writ of summons upon them by serving the defendant D. A. Carey substitutionally. The motion to stay the appeal was made on the ground that defendants were in contempt for having disobeyed an injunction granted on 12th January, 1903 (ante 33) restraining defendants from inducing, persuading, or ordering one Cresswell to refuse to continue in plaintiff's employment and to break his contract with plaintiff.

C. A. Moss, for plaintiff.

J. G. O'Donoghue, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—Since the argument of this motion it has been held by a Divisional Court (*Metallic Roofing Co. of Canada v. Local Union No. 3*, ante 183) that an association similar to defendants is not a body capable of being sued or

served as a body under the Rules of Court. . . .
 ect of the appeal sought to be stayed is to obtain a
 determination with regard to the position of the de-
 a. If they are a body not capable of being sued and
 ble of being served, they are not capable of being en-
 r of committing a contempt; and, as the very object
 appeal is to determine whether defendants can be sued
 ed with process, we cannot determine whether a con-
 as been committed without hearing the appeal. Be-
 e rule that a party guilty of contempt can take no
 the action is not a universal one; one exception is,
 party, notwithstanding his contempt, is entitled to
 necessary steps to defend himself. The defendants
 red to appear within ten days to the writ of summons,
 of having judgment signed against them; and they
 e right to shew, if they can, that the service upon
 not permitted by the practice: *Fry v. Ernest*, 9 Jur.
 51; *Ferguson v. County of Elgin*, 15 P. R. 399. Mo-
 used; but, as it appears that the president of the body
 e American Federation of Musicians, with full know-
 the injunction, has made the most strenuous efforts
 re Cresswell to break his contract, there should be

STER, MASTER.

MARCH 31ST, 1903.

CHAMBERS.

O'FLYNN v. MIDDLETON.

*ens — Discharge — Claim for Costs—Land in Question in
 Redemption Suit—Lien—Charging Order.*

on by defendant for order removing and discharging
 stry of a certificate of lis pendens, on the ground that
 was not entitled to register one in this action, which
 ought to recover the amount of a bill of costs and to
 a lien on land for such amount. Plaintiff admitted
 e could not retain the lis pendens against all
 s described, but contended that as to 25 acres he had
 and was entitled under Rule 1129 to a charging order
 amount of his costs. The action was defended and
 nt had counterclaimed against plaintiff.

A. Moss, for defendant.

C. A. DuVernet, for plaintiff.

MASTER held that the question whether plaintiff is
 to a lien on the 25 acres was one for the trial Judge
 e whole evidence had been adduced. Whether a soli-
 s a lien or is entitled to a charging order against the

land in question in a redemption suit for his costs incurred therein, will then be decided. *Scholefield v. Lockwood*, L. R. 7 Eq. 83, and *Bailey v. Birchall*, 2 H. & M. 371, referred to. Order made setting aside certificate of his pendens so far as it affects defendant's land other than the 25 acres. Costs in cause to defendant. The action should go to trial at the first sittings.

MARCH 31ST, 1903.

DIVISIONAL COURT.

BEDDELL v. RYCKMAN.

Discovery—Examination of Party—Affidavit of Documents—Action by Shareholder against Directors of Company for Account of Profits—Purchase of Businesses by Directors and Sale by them to Company — Postponement of Consequential Discovery till Liability Established — Sum Paid for Underwriting Shares — Discount on Shares Subscribed.

Appeal by defendant Cox from order of BRITTON, J., in Chambers (ante 148) affirming order of Master in Chambers (ante 186) requiring appellant to file a further and better affidavit on production, and to attend at his own expense to be further examined for discovery touching the matters in question in this action, and to answer all proper questions that might be asked of him, including those which he refused to answer upon examination on 20th November, 1902, and 7th January, 1903.

W. H. Blake, K.C., for appellant.

W. R. Riddell, K.C., and W. A. Lamport, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A.) was delivered by

MEREDITH, C.J.—The case made by plaintiff in his statement of claim is a single cause of action based upon the proposition that the appellant and his associates, as to the transactions detailed in the statement of claim, in the circumstances under which these transactions took place, stood in a fiduciary relation to defendant company, which prevented them from making any profit for themselves out of the purchase of the five businesses which were acquired by the appellant and his associates, and were afterwards transferred to defendant company for \$1,740,000, a sum far in excess of the purchase prices paid by them, and the relief claimed is an account and payment by defendants other than the company of the difference between the aggregate of the prices paid by appellant and his associates and what was

y the company to them in cash and shares. There are at but two issues of fact between the parties, viz., as to the existence of the alleged fiduciary relationship, and as to the appellants and his associates having purchased the business for less than they received from the company; and this is not relevant to these issues relates to the state of account, on the footing that the liability of appellants and associates is established. It is admitted that they received from the company a sum in cash and stock far in excess of what they paid, and the only matters really in controversy are their liability to account for the profit, and, if liability is established, the amount for which they are answerable. In my view of the case, there is no difficulty in directing discovery as to the details of the expenditures made by the appellants and his associates in acquiring the businesses, and sequential discovery as it is termed, should be postponed until their liability to account has been established; and all the plaintiff be prejudiced by such a course being taken while, if it is not taken, and it turns out that plaintiffs fail to establish liability, the appellants will have been obliged to make discovery as to matters in which neither plaintiff nor defendant company has any interest. It is the duty of the Court, as a general rule, to postpone consequential discovery until liability has been established: *Great Northern Colliery Co. v. Tucker*, L. R. 9 Ch. 376; *Re Leigh's Will*, 6 Ch. D. 256; *Benbow v. Low*, 16 Ch. D. at p. 98; *Wells v. Wells*, 18 Ch. D. 477; *Verminck v. Edwards*, 29 Ch. D. 189; *Whyte v. Ahrens*, 26 Ch. D. 717; *Fennessy v. Fennessy*, 37 Ch. D. 184; *Hurst v. Barber*, 12 P. R. 467; *Granger v. Temperance and General Life Assce. Co.*, 16 P. R. 467; *Dickerson v. Radcliffe*, 17 P. R. 586; *Sydney Cheese Factory Assn. v. Brower*, 19 P. R. 152; *Evans v. Evans*, 3 O. L. R. at p. 341; *Bray on Discovery*, p. 125; *Abbott v. Abbott*, 31 Ch. D. 374, *Elmer v. Creasy*, L. R. 9 Ch. D. 316, and *Owen v. Morgan*, 39 Ch. D. 316, distinguished.

As to the sum of \$250,000 said to have been paid to the Mutual Trust Company for underwriting the shares of defendant company, the appellants ought not to be required to make further answer. He admitted that this payment was made, and no object is to be gained by requiring him to make that admission. If plaintiff establishes the liability of appellants and his associates to account, and they seek to discharge themselves pro tanto by this payment, it will form no part of the account, as to the particulars of which the appellants should not now be required to answer. If plaintiff seeks to charge appellants and his associates as directors of the company with the \$250,000 as an unauthorized, and

illegal payment, out of the company's moneys, no such case is made on the pleadings, and the inquiry is irrelevant.

For the last of these reasons, appellant should not be required to make further answer as to the shares subscribed for by him or the discount or allowance said to have been made to him in respect thereof.

The reasons given apply to the affidavit on production as well as to the further examination.

Appeal allowed, orders set aside, and original application dismissed. Costs here and below to appellant in any event.

MEREDITH, J.

APRIL 2ND, 1903.

TRIAL.

KRUG FURNITURE CO. v. BERLIN UNION No. 112
AMALGAMATED WOODWORKERS INTERNATIONAL UNION OF AMERICA.

Trade Union—Unlawful Acts of Members—Watching and Besetting—“Boycotting”—Organized Body or Union—Parties—Question as to Incorporation—Pleading—Wairer—Acts of Foreign Member of Union—Agency—Injunction—Damages.

Action by a company carrying on business at Berlin against an association or federation of woodworkers and certain individuals, being officers, members, or agents of the Union, to recover \$2,000 damages for wrongfully and maliciously procuring plaintiffs' workmen to break their contracts and cease working for plaintiffs, and \$5,000 damages for conspiring against plaintiffs, and for an injunction restraining defendants from watching or besetting the railway station at Berlin or the works of plaintiffs, or the approaches thereto, or the places of abode of the workmen employed by plaintiffs, for the purpose of persuading or otherwise preventing persons who have or may enter into contracts with plaintiffs to commit a breach of such contracts, or persuading or preventing such persons from entering into plaintiffs' employment.

E. E. A. DuVernet and J. A. Scellen, Berlin, for plaintiffs.

J. P. Mabee, K.C., for defendants.

MEREDITH, J. . . . ‘Boycotting’ is, in some of its forms, very obnoxious to the law. That defendants were guilty of that crime and of the wrongs complained of is, upon the evidence, very plain. Indeed it is, to a certain extent, admitted by them in their consent to the interlocutory injunction made against them in this action; for injunctions are not consented to by, and do not go against, persons who

not done, and do not intend to do, any wrong: see *v. Leatham*, [1901] A. C. 495; *Reed v. Friendly Society*, [1902] 2 K. B. 9; *Lyons v. Wilkins*, [1899] 1 Ch. 255. In the case of some disagreement between plaintiffs and their employers, the woodworkers left the plaintiffs' employment and organized a "sympathetic strike." They had a right to do so as long as they broke no contract; and no complaint is made in that respect; what is complained of is the subsequent conduct of defendants. Their main purpose in striking was to compel plaintiffs to accede to the demands of the employers. Their plan to force plaintiffs to submit was to get other workmen taking the places of the strikers, and to constrain such of plaintiffs' workmen as had not left, to leave their employment, and to prevent the sale of the goods made by them, so that plaintiffs would be put in the position of having to submit or close their factory. So long as the plaintiffs resorted to lawful means only to accomplish a lawful object, they were within their right; but any unlawful means, or unlawful means to obtain a lawful object, should be met with prompt prevention and punishment. One of the objects of the workmen who had struck and of other members of the organized body to which they belonged, was to get watchers to beset and watch every day all trains passing the factory in view to intercepting any one who might have the chance of a workman employed or seeking employment by plaintiffs, and to beset and watch plaintiffs' factory and premises for the purpose of preventing new workmen from getting plaintiffs' employment and of constraining their workmen to leave such employment. The conduct of those who beset and watched the factory was often of an offensively and highly reprehensible character. In regard to boycotting, the plaintiffs mainly relied upon and proved was the intimidation of the dealer who bought and sold the product of plaintiffs' factory. The result has, in one case at least, been an intimidation of the dealer to such an extent that he is afraid to state the facts except secretly. The defendants must be held to have really intended that which is the plain effect of their conduct, the injury of the plaintiffs by intimidation. *Quinn v. Tatham*, [1901] A. C. at p. 38, and *Shilton v. Ellersby*, [1901] B. 74, referred to.

It is too late for the defendant union, the organized body, to contend that they are not incorporated, and therefore that the action should be dismissed as against them. They have, without objection, appeared, pleaded, and conducted the defence to the interlocutory order against them, by the order under which they are sued. The Rules of Court provide that the defence of null corporation shall not be pleaded. *Duke of Bedford v. Ellis*, [1901] B. 280, 281.

[1901] A. C. 1, and Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, ib. 426, referred to.

As to the individual defendants (other than Mulcahy), they took an active part in the wrongs mentioned, and so are individually answerable for the injury done. All that was done was the result of organized combined action on the part of the members of the union, under the leadership and encouragement of these individual defendants. Defendant Mulcahy was the chief presiding officer of the whole organized body, and came to this country for the purpose of aiding, encouraging, and directing the operations of the striking workmen and their associates. He is chiefly answerable for the concerted acts of the strikers during the time he was with them. It is no answer to plaintiffs' complaint to say that he was a stranger here, and unacquainted with the laws of the land. Before undertaking or encouraging any act aimed at the injury of another, and especially any act likely to cause a breach of the peace, he ought first to have ascertained whether it was lawful or unlawful. This defendant was a party to the unlawful and wrongful acts committed by his co-defendants, and is answerable with them for the consequences. Plaintiffs are entitled to a perpetual injunction restraining defendants from unlawfully besetting or watching plaintiffs' factory and from all wrongful obstruction of or interference with plaintiffs in their trade and business, and to damages, against all the defendants, assessed at \$100, with costs.

FALCONBRIDGE, C.J.

APRIL 3RD, 1903.

TRIAL.

DAINARD v. MACNEE.

Solicitor—Lien on Title Deeds—Relationship of Solicitor and Client—Proceedings for Partition—Conveyancing Charges—Amount of Lien for—Assault—Costs.

Action to recover damages for detention of title deeds to certain land in the village of Milford, in the county of Prince Edward, and also for an assault alleged to have been committed by defendant upon plaintiff when he attended at defendant's office to get the deeds. Defendant alleged that he was retained as solicitor by Beatrice Hineman, one of the heirs-at-law of Samuel Jenkins, deceased, the father of plaintiff, to commence and carry on an action for the partition or sale of the land, and alleged his willingness to give up the

on payment of his proper charges and disbursements
 ect of those and other proceedings.

M. Young, Picton, and M. R. Allison, Picton, for
 ff.

H. Widdifield, Picton, for defendant.

LCONBRIDGE, C.J.—At the trial I found as a fact that
 ff had agreed to pay the costs of the proceedings
 rtition or sale; but these proceedings were not insti-
 oy plaintiff; the retainer and instructions for them
 rom Mrs. Hineman, one of the other heirs-at-law.
 ore, defendant had no lien in respect of these charges,
 e the relationship of solicitor and client between de-
 t and plaintiff did not exist at the time when the debt
 curred: Poley's Law of Solicitors, p. 328, and cases
 ited.

endant would not, in any event, have been entitled to
 ssion under Rule 1146 (as the proceedings did not go
 ctual partition), but only to a reasonable amount for
 paration of the notice of motion, about \$7 or \$8.

to the fees, charges, and disbursements in connection
 ne conveyance to the corporation of the township of
 Marysburgh, defendant rendered services to plain-
 respect of which he has a lien. The amount of pur-
 money to be paid was \$50, and a bill for \$27.22 is
 nat startling.

e alleged assault amounted to nothing.

ion dismissed. Defendant asserted a lien in respect
 matter as to which he had no lien; and he insisted
 an extravagant amount being paid to him before he
 deliver up the papers, viz., \$75, although he after-
 offered to accept \$50. Therefore, no costs. Plaintiff
 have proceeded by summary application in the High
 or else in a Division Court.

ESTER, MASTER.

APRIL 4TH, 1903.

CHAMBERS.

MORANG v. HOPKINS.

*lars—Replevin for Books and Papers—Master and Servant—
 Facts within Knowledge of Both Parties.*

tion by defendant for particulars of statement of
 Action for the return of certain books, papers, and

documents connected with the compilation and publication of "Morang's Annual Register," and for an injunction restraining defendant from using the same in connexion with any rival enterprise or otherwise to the detriment of plaintiff. The application was made before delivery of defence, and each party was allowed to examine the other for discovery, and had done so.

A. J. Russell Snow, for defendant.

J. H. Moss, for plaintiff.

THE MASTER.—It is evident from the examinations that defendant can plead without particulars, the whole question being whether plaintiff is entitled to the books, papers, and documents received by plaintiff or defendant, and whether addressed to the one or the other, during the period of defendant's employment by plaintiff. The defendant asserts a right to retain those that were sent to him direct and which he arranged for on his own account. Plaintiff claims these as well as those sent to plaintiff himself. Defendant knows what he has received better than plaintiff. The particulars of the agreement of service are equally within the knowledge of plaintiff and defendant. Motion refused. Defendant to deliver his defence forthwith. Costs to plaintiff in the cause.

WINCHESTER, MASTER.

APRIL 4TH, 1903.

CHAMBERS.

CHANDLER AND MASSEY (LIMITED) v. GRAND TRUNK R. W. CO.

Parties—Joinder of—Two Defendants—Different Causes of Actions—Sale of Goods—Claim against Vendee for Price—Claim against Carrier for Loss in Transit.

Motion by defendant company for an order requiring plaintiffs to elect to proceed against one defendant or the other alone. The plaintiffs alleged that they sold to the defendant William Kerr a static machine and outfit of the value of \$430, and a water meter of the value of \$27, and shipped them to him at Dunnville by the railway of the defendant company; that the machines arrived at Dunnville and were destroyed by fire in the freight sheds of defendant company. Plaintiffs claimed the value of the goods from defendant company as common carriers, or, in the alterna-

there had been a constructive delivery to defendant
 they claimed the price of the goods from him.

McCarthy, for defendant company.

Moss, for defendant Kerr.

Sadler, for plaintiffs.

MASTER held that, as plaintiffs claimed as owners
 machines as against defendant company, and against
 Kerr on the theory that he was the owner, the case
 within the scope of Rule 186. *Rivers v. Clark, L.*
at p. 97, applied and followed. *Quigley v. Waterloo*
, 1 O. L. R. 606, *Evans v. Jaffray, ib. 614*, and cases
 referred to, considered. Order made staying pro-
 until plaintiffs elect as against which defendant
 proceed. If they abandon the action against de-
 company, the action will be dismissed with costs,
 the costs of this application. But, if they abandon
 defendant Kerr, the action as against him will be
 d, and the costs of this application will be to de-
 company in any event.

J.

APRIL 4TH, 1903.

TRIAL.

SMART v. DANA.

*Payment out of Fees of Office—Amount Stated in Patent—
 "Revenues"—Disbursements—Allowances Received as
 Fee for Creditors and as Returning Officer—Penalty—Judg-
 Breach—Damages—Assessment—Future Damages.*

on by the former sheriff of the united counties of
 and Grenville against George A. Dana, the present
 of these counties, and W. H. Comstock and James
 g, upon a bond given by Dana as principal and the
 two defendants as sureties, for \$10,000. By letters
 under the great seal of the Province dated 1st No-
 1898, Dana was appointed sheriff "in the room
 of James Smart, Esquire, resigned," "subject to
 lition that you, the said George Augustus Dana,
 ring your occupancy of the said office . . . pay
 id James Smart out of the revenues of the said office,
 as the said James Smart shall live, at the rate of
 per annum . . . the said James Smart having

held the said office for many years, and, owing to the infirmities of old age, coupled with disabilities from an accident, being no longer able to personally discharge the duties of the same." The bond was dated 28th January, 1899, and was for the due performance of the terms of the condition. Payments were made by Dana to plaintiff in the years 1898-1902; and on 18th March, 1902, Dana resigned his position as sheriff for the purpose of avoiding any further liability under the bond and under the condition. He was re-appointed by letters patent dated 24th April, 1902, in which no conditions were imposed. The present action was brought on 11th April, 1902.

C. H. Ritchie, K.C., for plaintiff.

- A. B. Aylesworth, K.C., and M. M. Brown, Brockville, for defendants.

STREET, J., held that the bond was good, coming within the exception created by sec. 11 of 49 Geo. III. ch. 126, as to annual payments out of the fees of an office to a former holder of the office, where the amount so payable is stated in the patent. The word "revenues" used in the patent must be construed to mean the income of the office after deducting the necessary disbursements connected with it; such disbursements must be made from the receipts in any event, and if the balance remaining is less than the amount of plaintiff's annuity, the whole annuity cannot be paid out of it; therefore all he can claim is the balance, for his annuity is payable out of the fund. The exception in the statute should be strictly construed. The payment to be made is to be set aside annually, and to give proper effect to the restrictions with which the exception is fenced, it should be held that the annual sum is intended to be reserved, and paid out of the revenues of the year in which it becomes payable, and not out of those of any other year in whole or in part. The word "revenues" must be treated as the equivalent of "fees, perquisites, or profits" in sec. 11; and, as a sheriff is bound by sec. 14, sub-sec. (4), of R. S. O. ch. 147, to act as assignee for creditors if required to do so, the allowances made to him as assignee are "perquisites or profits" of his office, and therefore part of the revenue of it within the meaning of the patent and bond. So with payments made to him for services as returning officer. Plaintiff is entitled to judgment for the penalty of the bond. Damages to the issue of the writ assessed at \$131.33 and interest, and execution to issue therefor. Execution stayed on the \$10,000 until further damages shall be assessed for breaches, if any, occurring after the issue of the writ in the present action. As

nt Dana only resigned his office on 18th March, 1902, willing to account under the terms of the bond to te, the amount at present recoverable is not affected consideration as to the effect of the resignation upon instalments. Plaintiff to have costs of the action on h Court scale.

APRIL 4TH, 1903.

DIVISIONAL COURT.

RE JOHNSON, CHAMBERS v. JOHNSON.

*Construction—Bequest to One for Use of a Church—Trust—
ed Fund—Perpetuity—Abatement of Legacies—Mortmain*

deal by Jennie Ball and Elizabeth M. Rice, two of the s under the will of James Johnson, deceased, from an f Boyd, C., in Chambers (1 O. W. R. 806), on a mo- the executor of the deceased under Rule 938 for an onstruing the will.

G. O'Donoghue, for appellants.

W. Saunders, for the trustees of a church.

M. Douglas, K.C., for the executors.

judgment of the Court (FALCONBRIDGE, C.J., r, J., BRITTON, J.) was delivered by

REET, J.—Testator died 12th April, 1895, and by his amongst other things, directed his executors to sell his d personal estate, and out of the proceeds, amongst things, to pay to the Reverend Nevin Woodside \$2,000 use of the Reformed Presbyterian Church, such sums expended by him in the manner best calculated, by him ance the principles of that church; and he bequeathed ach to the appellants. It was admitted that the lega- question were, in the result, payable almost entirely the proceeds of land directed to be sold by the will in n, and that, the fund being insufficient to pay all the s, there must be an abatement. . . . The bequest e use of the church is a good charitable bequest for the ement of religion : *Baker v. Sutton*, 1 Keene 232; end v. Carns, 3 Hare 257; *Thornton v. Howe*, 31 Beav. 19, 20. *Stewart v. Greene*, Ir. R. 5 Eq. 470, distin- d. Being a good charitable bequest, it is not subject

to the law against perpetuities: *Re Clark*, [1901] 2 Ch. 110. The testator died after 14th April, 1892, and so the case is governed by sec. 8 of R. S. O. ch. 112, which exempts money arising from land from the operation of the Mortmain Act. Appeal dismissed with costs, payable out of the legacies of appellants, and any balance to be paid by themselves.

APRIL 4TH, 1903.

DIVISIONAL COURT.

REX v. LEWIS.

Criminal Law—Justice of the Peace—Summary Conviction under Master and Servant Act—Information—Nature of Offence—Reference to Act—Amendment of Information without Re-swearing—Absence of Objection—Form of Conviction—Omission of Date and Place of Offence—Amendment—Heading of Conviction—Costs.

Motion by defendant to make absolute a rule nisi quashing conviction of defendant under the Master and Servant Act. The prosecutor, one Stoddart, hired defendant in Toronto to go to Bradford to work for him, and, as defendant said he had no money to pay his railway fare to Bradford, he bought a ticket for defendant at his request and handed the ticket to the conductor for defendant. After defendant's arrival he worked for Stoddart for a few hours, not sufficient to repay Stoddart for his outlay, and then refused to do any more work, and left. Stoddart went to one Broughton, a justice of the peace, and swore to an information that "William Lewis did on the 28th July accept the sum of \$1.30 to pay his fare to Bradford, on the condition that said amount was to be worked out, and that the said William Lewis refused to work after reaching this place, with the exception of four hours and thirty minutes." The magistrate thereupon issued a warrant to arrest defendant. In the warrant the facts stated in the information were substantially set out, but with the addition, at the end, of the words "consequently obtaining money under false pretences." Lewis was arrested and brought before the magistrate on Saturday 2nd August, 1902, at 8.30 p.m. The magistrate, in the presence of the prosecutor, amended the information by adding at the end the words "as per section 14 (5a), Master and Servant Act, Ontario statutes 1901;" but the information as amended was not resworn. The amended information was then read over to the prisoner, and he was informed that he was to be tried under it as amended. He

application for adjournment, nor objection to the proceeding. The prosecutor gave evidence, and the prisoner sworn and gave evidence on his own behalf, and the court then adjudged that he should be fined \$5 and \$4.88, and that if the amounts should not be paid forthwith should be committed to the common gaol at Barrie for six days; and a note of this conviction was made by the clerk at the foot of the proceedings, and a formal certificate was drawn up afterwards. Lewis, after remaining in custody for about an hour, gave security for payment of the fine and was released. The formal conviction stated that Lewis having entered into an agreement with one Fred Stoddard to perform work and services for the said Stoddard at the place of Bradford, under which he . . . received from said Stoddard as an advance of wages the sum of \$10, and a railway ticket for his transportation from Toronto to Bradford, did without the consent of said Stoddard leave Bradford before the cost of such transportation had been paid contrary to the provisions of the Act respecting Master and Servant, R. S. O. 1897 ch. 157, as amended by 1 R. S. O. ch. 12, sec. 14." Lewis was adjudged to pay \$4.88 for costs, and, if these sums were not forthwith paid, he be imprisoned for ten days unless the several sums be tendered or paid.

Woods, for defendant.

McConnell, K.C., and A. E. Scanlon, Bradford, for the prosecutor.

COURT (FALCONBRIDGE, C.J., STREET, J., BRIDGES, J.) held that the nature of the offence intended to be committed against defendant was sufficiently clear in the information, and any doubt was removed by the reference to the Act. The amended information was not resworn, but having been read over to defendant, the trial having proceeded without any protest or objection on his part, and he having been sworn as a witness on his own behalf, the magistrate, having brought defendant before him, and although he might have been brought there improperly, proceeded to try him upon an amended information, notwithstanding although the Act under which he was tried requires a trial on oath, provided defendant does not protest: *Regina v. Postmaster-General*, 5 B. & S. 756; *Regina v. Dixon*, 4 Q. B. D. 614; *Dixon v. Wells*, 25 Q. B. D. 249; Criminal Code.

Court, being satisfied from a perusal of the deposition that an offence of the nature described in the conviction

had been committed by defendant, and that the magistrate had jurisdiction over it, should not hold the conviction invalid by reason of the fact of the date and place of the offence not being stated in it, for these clearly appeared from the depositions, and the Court had power under secs. 883 and 889 of the Code to amend the conviction by stating the offence to have been committed at Bradford on 29th July, 1902. On the evidence, it could not be held that defendant was not allowed to make his defence. The objection that the conviction was headed "conviction for a penalty to be levied by distress" was of no weight, for the body of the conviction was correctly drawn under the statute, and the heading is not a part of the conviction. The costs of conveying defendant to gaol were not included; but the conviction might, if necessary, be amended in that respect; as a matter of fact, there were no such costs. There is special power in the section under which defendant was convicted to award imprisonment in default of payment, and by R. S. O. ch. 90, sec. 4, this power covers costs as well as fine. Rule nisi discharged with costs.

THE MARIO WEEKLY REPORTER.

(TO AND INCLUDING APRIL 11TH, 1903.)

TORONTO, APRIL 16, 1903.

No. 14.

APRIL 4TH, 1903.

TRIAL.

GRIFFITH v. HOWES.

*Construction—Life Insurance Moneys—Attempt to Apply by
to Debts—Previous "Designation" in Favour of Children—
on—Mortgage—Charge on Land—Failure of Specific Legacy
se—Estate—Term—Maintenance.*

by the infant children of Sarah Elizabeth Lowery,
wife of John Lowery, of the township of Hinchin-
in the county of Frontenac, farmer, against her ex-
for administration of her estate and construction of
etc. In 1889 the testatrix, being then a widow,
a benefit certificate of insurance under R. S. O.
36, payable at her death to her children John and
She afterwards married John Lowery, and had a
him, Lena, in 1891, and in 1892 she surrendered
certificate and obtained another payable to "her
ers as designated by her will." Her will (which was
out a month before the last certificate) referred to
e children in the way of bestowing benefits upon
t had this specific designation of the insurance
"My life insurance in the Chosen Friends I give
ueath to my executors for the purpose of paying
all debts due by me at my decease, including the
e made by me to Warner."

J. Macdonnell, K.C., for plaintiffs.

J. Sullivan, Kingston, for defendants.

O, C.—The disposition of the insurance moneys by
is repugnant to the statute under which the insur-
es, by which it is declared that, so long as any object
trust remains, the money payable under the policy
t be subject to the control of the creditors or form

part of the estate of the deceased: R. S. O. 1887 ch. 136, sec. 5; and by sec. 10 it is to be paid so as to be "free from the claims of creditors." The disposal of the moneys by the will is inoperative, and the last certificate alone speaks, by which it goes to "her legal heirs," and the three children answering that description are named and referred to in a sufficient "designation" to carry out the wishes of the deceased as expressed in the certificate. In the Oxford Dictionary "designate" is defined as "to point out," "to point out by name or descriptive appellation." The will refers to "my son John Arthur Griffith," "my daughter Lizzie Maud," "my daughter Lena," and "my three children." Therefore the insurance money and its accretions in Court go equally among these three children as "legal heirs designated" in the will pursuant to the certificate: *Moffet v. Catherwood*, Alc. & Nap. 472; *Mearns v. United Order of Workmen*, 22 O. R. 34.

It was argued that a case of election arises in respect of this clause in the will disposing of the insurance moneys to pay debts by which the children must choose between the insurance moneys (given away from them by the will) and the other benefits validly given to them by the will. . . . The will does not present a case of election, though the claim to the insurance moneys under the certificate may be contradictory of the direction to pay debts therewith: see *Higgins v. Alexander*, cited in *East v. Cook*, 2 Ves. Sen. 31. The question arises only in respect of the mortgage debt due on the farm. But by the terms of the will the payment of that debt is primarily charged on the Parham and Sydenham lots, and these were sold, and the proceeds applied as directed by the will, but a balance of \$347 was still left on the mortgage, which was paid by the executor George Howes out of his own moneys. Justice will be done by letting that stand as a charge in his favour on the farm, collectable when the two Griffith children attain 21, without interest.

On the general point as to election, the rule laid down by Pearson, J., in *Re Warren*, 26 Ch. D. 219, and followed by the Court of Appeal in *Re Handcock*, 23 L. R. Ir. 34, is applicable. The statute controls and limits the destination of the insurance moneys, and the testatrix must be taken to know the law, that her direction was nugatory, and the will is to be read as if the invalid clause were expunged: *Heath v. Greenbank*, 1 Ves. Sen. at p. 307.

The bequest to Lena of \$300 fails, because it was to be paid out of the proceeds of land, which proved insufficient.

The conveyance of the farm by the executors to George Howes in fee simple is in violation of the will. By the will

s given to the son John for his own use and benefit subject to the payment of \$500 to the daughter when she shall come of age. By the codicil ("in my will") the farm is given to George Howes to his own use and benefit as a maintenance and support for his children John and Lizzie until they come of age. As to the possession till then, and the fee simple, subject to George's limited estate, is in John. Costs of all the contest as regards the insurance moneys to be paid out of that fund. As to the rest of the litigation each party to bear his own costs.

MASTER,

APRIL 6TH, 1903.

CHAMBERS.

K EX REL. O'DONNELL v. BROOMFIELD.

Elections—County Councillor—Disqualification—Member of School Board for which Rates are Levied—Statutes—Clause—Relator Claiming Seat—Necessity for Notice at Election—Costs of Quo Warranto Application.

Application in the nature of a quo warranto to set aside the election of the respondent as a county councillor for division 7 of the county of Ontario and to have it declared that the relator was entitled to the office instead of the respondent.

The relator alleged that at the time of the election, and immediately after it, the respondent was a member of a school board for which school rates were levied, namely, of the board of trustees for school section 3 in the township of Broomfield and was therefore disqualified.

The respondent admitted that he was a school trustee at the time of the election, but shewed that he had resigned that office before taking the oaths of qualification and office and was therefore entitled to his seat as a county councillor.

McGillivray, K.C., for relator.

Farewell, K.C., for respondent.

MASTER.—It appears to me that the object in making this application is not so much to have the election of the respondent set aside as to have the seat awarded to the relator without running the risk of a new election. Under the authorities the relator is not entitled to the seat. To entitle him to the seat claimed by him, on the ground of his alleged disqualification, it must be shewn that the qualification was objected to at the nomination, so that the electors

might have an opportunity of nominating another candidate: *Regina ex rel. Ford v. McRae*, 5 P. R. 309, 315; *Regina ex rel. Tinning v. Edgar*, 4 P. R. 36; *Regina ex rel. Adamson v. Boyd*, *ib.* 204. . . .

The statute under which it is contended that the respondent is disqualified is 2 Edw. VII. ch. 29, sec. 5, which amends sec. 80 of the Municipal Act by inserting therein, after the word "trustee" in the 8th line, the words "and no member of a school board for which rates are levied." . . .

The evidence herein shews that the respondent was elected a member of the board of school trustees for school section 3 of the township of Mara on or about the last Wednesday in December, 1900, for a term of three years from that date. On or about the 15th January, 1903, he resigned the office of school trustee, with the consent expressed in writing of his colleagues in office, as provided by sec. 16 of the Public Schools Act, 1 Edw. VII. ch. 39. This was before taking the declarations of property qualification and of office required to be taken by all members of county councils before taking their seats.

It was contended for the respondent:

First, that sec. 76 of the Municipal Act, relating to the qualifications of different members of local municipalities, does not relate to the qualification of a county councillor, and therefore cannot be considered in connection with sec. 80, relating to the disqualification of members of the council of any municipal corporation; and that, under sec. 80, as amended by 2 Edw. VII. ch. 29, sec. 5, the respondent was not disqualified when he became a member of the county council, that is, when he took his seat.

Second, that the amendment refers only to members of a council of the same municipality which levies the rates for the school board of which the councillor is also a member, and therefore, as the county council of which respondent is a member does not levy rates for the school board in question, the respondent is not disqualified.

Third, that the saving clause in the amending section, viz., "this amendment shall not apply so as to disqualify any person elected prior to the passing of this Act," enures to the benefit of the respondent, as he was elected a school trustee before the passing of the Act.

As to the first objection, I agree that sec. 76 does not apply to county councillors. . . . Section 77 provides for the qualifications of a county councillor. . . . The words "and is not disqualified under this Act," used in sec. 76, are omitted from sec. 77, and it is therefore argued that

the disqualifications mentioned in sec. 80 do not apply to the respondent at the time of the election, as provided for by sec. 76, but only apply to him when he actually takes his seat and acts as a member of the county council. I do not agree with this contention: *Regina ex rel. Rollo v. Beard*, 3 P. R. 357, 364. . . . This judgment is peculiarly applicable to the case under consideration. At the time of the election—which has been decided again and again to commence on the day of nomination: *Regina ex rel. Rollo v. Beard*, 3 P. R. 357; *Regina ex rel. Adamson v. Boyd*, 4 P. R. 204; *Regina ex rel. Clancey v. McIntosh*, 46 U. C. R. at pp. 105-6; *Regina ex rel. Taverner v. Willson*, 12 P. R. 546—the respondent was a member of a school board for which rates are levied; and his resigning from that position subsequent to his election as a county councillor, will not relieve him from disqualification, if he were at the time of nomination actually disqualified. . . .

The second objection is as to the interpretation to be placed on the words of the amending statute, "and no member of a school board for which rates are levied." It is contended that these words refer to a school board for which rates are levied by the municipality for which the disqualified member was elected, and not to a member elected to the council of a municipality which does not levy rates; that, had the Legislature desired to disqualify all school trustees, the word "High" would have been struck out of line 7 of the section, or the words "for which rates are levied" would have been omitted from the amending section. . . . Can I place upon these words an interpretation which the Legislature has not seen fit to adopt? [*Carroll v. Beard*, 27 O. R. 347, 358, referred to, as to the interpretation of statutes, and *Regina ex rel. Baynes v. Detlor*, 4 P. R. 195, as to the question of disqualification.] . . .

It is not at all clear that a county councillor would not have conflicting duties to perform, and would not represent conflicting interests, if he also held the office of school trustee of a school section within the county for which he had been elected a councillor. As to such duties, I would refer to secs. 424 and 435 (4) of the Municipal Act, R. S. O. ch. 223, and secs. 8 (6), 9, 42, 47, 71, 72 (1), 78, 79, 83, 84 (3), 86 (3), (6), (7), (8), (13), of the Public Schools Act, 1901. There is no dispute that rates are levied for the school board in question. The only question is, by what municipality are such rates levied? With considerable hesitation, I have come to the conclusion that it makes no difference what municipality raises or levies the rates; that the words employed by the Legislature disqualify any member of the council of any

might have an opportunity of nominating another candidate: *Regina ex rel. Ford v. McRae*, 5 P. R. 309, 315; *Regina ex rel. Tinning v. Edgar*, 4 P. R. 36; *Regina ex rel. Adamson v. Boyd*, *ib.* 204. . . .

The statute under which it is contended that the respondent is disqualified is 2 Edw. VII. ch. 29, sec. 5, which amends sec. 80 of the Municipal Act by inserting therein, after the word "trustee" in the 8th line, the words "and no member of a school board for which rates are levied." . . .

The evidence herein shews that the respondent was elected a member of the board of school trustees for school section 3 of the township of Mara on or about the last Wednesday in December, 1900, for a term of three years from that date. On or about the 15th January, 1903, he resigned the office of school trustee, with the consent expressed in writing of his colleagues in office, as provided by sec. 16 of the Public Schools Act, 1 Edw. VII. ch. 39. This was before taking the declarations of property qualification and of office required to be taken by all members of county councils before taking their seats.

It was contended for the respondent:

First, that sec. 76 of the Municipal Act, relating to the qualifications of different members of local municipalities, does not relate to the qualification of a county councillor, and therefore cannot be considered in connection with sec. 80, relating to the disqualification of members of the council of any municipal corporation; and that, under sec. 80, as amended by 2 Edw. VII. ch. 29, sec. 5, the respondent was not disqualified when he became a member of the county council, that is, when he took his seat.

Second, that the amendment refers only to members of a council of the same municipality which levies the rates for the school board of which the councillor is also a member, and therefore, as the county council of which respondent is a member does not levy rates for the school board in question, the respondent is not disqualified.

Third, that the saving clause in the amending section, viz., "this amendment shall not apply so as to disqualify any person elected prior to the passing of this Act," enures to the benefit of the respondent, as he was elected a school trustee before the passing of the Act.

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municipal corporation who was at the time of his election a member of a school board for which rates are levied, whether levied by the municipal corporation to the council of which he was elected, or by any other.

As to the third objection, namely, that the respondent having been elected a school trustee before the passing of the amending Act, the saving clause relieves him from disqualification, I do not agree with the argument. The saving clause refers to the election of the member of the council of any municipal corporation, not to the election of a school trustee.

Rex ex rel. Zimmerman v. Steele, ante 242, followed as to all the objections.

The election must be set aside, and there must be a new election.

The costs have been unnecessarily increased by reason of the relator applying to be seated in the place of the respondent. It is true that the respondent might have disclaimed and saved further expense, but that would have given the seat to the relator, who has been found to be not entitled to it, and who does not appear to have had at the time of the election the confidence of a sufficient number of electors to elect him. Under the circumstances, while giving the relator the costs of the proceedings against the respondent so far as he has succeeded, he must pay the respondent his costs of opposing the application to seat the relator; the costs of the one to be set off against the costs of the other pro tanto.

WINCHESTER, MASTER.

APRIL 6TH, 1903.

CHAMBERS.

REX EX REL. ROBINSON v. McCARTY.

Municipal Elections—Township Councillor—Disqualification — Membership in School Board for which Rates are Levied—Statutes—Claim to Seat — Objection not Taken at Nomination — Costs — Status of Relator—Nominee of Township Clerk.

Application in the nature of a quo warranto to set aside the election of the respondent as a councillor for the township of East Nissouri, in the county of Oxford, and to have it declared that one Thomas Richardson should be admitted to the office instead, upon the ground that the respondent was disqualified by reason of being at the date of the election a member of the school board for union school section 5 in the township of East Nissouri, a school board for which rates are levied.

J. P. Mabey, K.C., for relator.

A. B. Aylesworth, K.C., for respondent.

THE MASTER.—From the nature of the evidence adduced by the relator, I am of opinion that the real intent of the nomination is to seat Richardson in the place of the respondent. This, however, cannot be done under the circumstances as it is not even attempted to be shewn that the respondent's qualification was objected to at the nomination, and the electors might have an opportunity of nominating another candidate: *Regina ex rel. Tinning v. Edgar*, 4 P. R. 315; *Regina ex rel. Adamson v. Boyd*, ib. 204; *Regina ex rel. McRae*, 5 P. R. 309, 315; *Regina ex rel. Forward v. Steele*, 4 P. R. 198; *Rex ex rel. Steele v. Zimmerman*, 2 P. R. 2.

On reference to the grounds of disqualification alleged against the respondent, I have had occasion to consider these in *Rex ex rel. O'Donnell v. Broomfield*, ante 295, in which I followed the decision of the Chief Justice of the Bench in the *Zimmerman* case, and held the respondent disqualified for the reasons stated.

In addition to the arguments put forward in *Rex ex rel. O'Donnell v. Broomfield*, counsel for the respondent in this case contends that the respondent, being a trustee of union section number 1 and 5 in the townships of North Oxford and East Nissouri, does not come within the disqualification clause, which states "and no member of a school board, on which rates are levied."

It appears to me that it is not material whether the respondent is a member of a corporation called "The Board of School Trustees of Union Section," etc., or whether he is a member of "The ——— Public School Board;" he is a member of a "school board" within the provisions of the Act respecting Public Schools, 1 Edw. VII. ch. 39. . . . It is evident from the different sections of this Act that the section in question has a board of trustees, and also rates are levied for its use. Even if the word "board" as used in the Public Schools Act, there being in fact a board formed to carry on the educational system of the township at the public expense, I would hold that the disqualification clause in question would refer to the members of the board for the time being.

On reference to the costs of these proceedings, I am of opinion . . . that the relator has been put forward by the township, and that he is in reality the relator. Affidavits to my mind indicate that fact. See *Regina ex rel. Mullen v. DeLisle*, 8 U. C. L. J. 291, and *Regina ex rel. Booth v. Booth*, 9 P. R. 452. But I do not think that I can apply these decisions in the absence of actual proof

that the clerk of the township is behind the proceedings. The relator has put the respondent to considerable expense with reference to his claim to be seated. These costs should be paid by the relator. Under the circumstances, a proper exercise of discretion as to costs will be that each party pay his own costs.

The seat to be declared vacant and a new election ordered.

MACMAHON, J.

APRIL 6TH, 1903.

TRIAL.

BIRNEY v. SCARLETT.

Way—Removal of Sand from Streets Laid out in Plans—No Dedication or Acceptance as Highways — Mortgage — Foreclosure — Extinction of Mortgagor's Rights in Streets.

Action for damages for the removal of timber, sand, and gravel from certain streets in the town of Toronto Junction.

Louisa Scarlett died 28th December, 1883, having by her will devised the east half of lot 36 in the 3rd concession from the bay in the township of York, containing 100 acres, to her husband, John A. Scarlett, and her children.

On 26th May, 1887, certain of the devisees executed a quit claim of all their interest in the land to the other devisees. These latter subdivided part of the land into lots, and, as the owners thereof, registered a plan of the subdivision, on 12th April, 1888, as plan 838.

Certain other parts were afterwards subdivided into lots, and a plan thereof was registered by the same persons, as owners, on 26th November, 1889, as plan 969.

All of the lots included in the subdivisions mentioned in plans 838 and 969, and also the remaining portions of the east half of lot 36, were subsequently acquired by John A. Scarlett, Joseph Birney (the plaintiff), and John L. Birney, as tenants in common, and they gave back to the vendors mortgages thereon to secure the greater part of the purchase money, amounting to about \$130,000. The mortgagees covenanted that they would assent to a re-subdivision of the lands, and the mortgagors prepared a plan shewing a re-subdivision of the parts already subdivided, and also a subdivision of the parts not already subdivided, which plan was filed on 12th October, 1890, as plan 1067. Indorsed on the plan was this certificate: "The owners of the property laid out upon this plan, for themselves, their agents, executors, administrators, and assigns, reserve the right to remove all sand, gravel, clay, and timber they may see fit from all roads, streets, lanes,

mons, laid out thereon, for and during the period of s from the registration of said plan." The certificate ed by the mortgagors, mortgagees, and the mayor own of Toronto Junction.

9th June, 1890, an agreement was entered into be- e corporation of the town and the mortgagors provid- the land in question should, subject to the approval. ieutenant-Governor, be added to the town of Toronto, , to be subject to the assessment as therein provided. e of the provisions in the agreement was that, save pt as to the Weston road south, the streets, avenues, s laid out on the plan should not be held to be dedi- highways by reason of the property being annexed to Junction, or by reason of the assessment per foot , or by reason of the corporation laying the water Mary avenue, and that the corporation should not to adopt or be responsible for the same as highways- icated and accepted as such by by-law.

law was passed by the town council on 22nd Decem- 0, by which the lands were added to the town, sub- e approval of the Lieutenant-Governor, upon certain (a) That the lands should not be assessed for more per foot frontage, until sold, etc. (b) That the own- d have the right to remove all timber, gravel, or clay all roads, streets, lanes, or avenues laid out upon the , according to plan 1067, excepting the Weston road (c) That the town corporation should not be held to pted or be bound to adopt or accept any of the roads, lanes, or avenues, as highways, except the Weston th, and should not be responsible for them as high- il dedicated and accepted as such by by-law.

of the lots on these plans was sold or conveyed by eys and John A. Scarlett.

r mortgages to the vendors being in arrear, the latter th January, 1892, began an action for foreclosure, al order of foreclosure was issued on the 5th Sep- 1893.

e judgment and final order the streets referred to in s were, with the exception of the Weston road south Albany road, included in the foreclosure.

the final order the plaintiffs in that action obtained from the Judge of the County Court of York dated cember, 1897, amending registered plans 839 and doing away with certain blocks and lots thereon and g up all the streets named upon such plans except

Albany road and the Weston road south, which had been accepted by the town corporation as public highways. The amended plan was filed on 19th October, 1897, as No. 1196.

In November, 1897, the plaintiffs in that action leased to defendant Smith certain portions of the east half of lot 36, containing 70 acres, with the right to remove gravel therefrom for twenty years. The portions leased included the Albany road and other streets and avenues. Smith assigned the lease to defendants the Gravel and Construction Company of Toronto.

Joseph Birney died 15th March, 1901, intestate, leaving plaintiff his sole heir and next of kin.

Plaintiff sued as owner of an undivided two-thirds interest in the gravel on those streets for damages for its removal.

A. B. Aylesworth, K.C., for plaintiff.

E. D. Armour, K.C., and R. B. Henderson, for defendants.

MACMAHON, J. (after setting out the facts as above):—The streets laid out on the plans, from which gravel was taken, were not public highways, as no lots had been sold to purchasers: In re Waldie and Burlington, 7 O. R. 192, 13 A. R. 104; Roche v. Ryan, 22 O. R. 107. And even had lots been sold fronting on the streets so as to constitute them public streets within the town, the town corporation would be free from any liability to keep them in repair unless they were established by by-law or assumed for public use by the corporation: R. S. O. ch. 223, sec. 607. The agreement between the town and the Birneys and Scarlett and the passing of the by-law by the town must, therefore, have been regarded in some way as an additional protection to the corporation beyond that afforded by the Act. Until the municipality had in some way, as by the expenditure of public moneys, assumed the streets for public use, the corporation would not own, and therefore would have no power to sell, sand or gravel from these streets under sec. 640, sub-sec. 7, of R. S. O. ch. 223.

The Albany road was a winding road through the east half of lot 36, and a conveyance was made of that part of the lot east of the Albany road, and another conveyance was made of that part to the west of the west side of that road, so that the road (which was never a public road) remained in the grantors, the Scarletts. Afterwards parts of what was known as the Albany road were included in the lots forming the subdivision of lots on plan 969, and a new street called Albany road was laid down on plan 1067. I fail to see how Albany road stood in any different position from the other

the plan, which were included in the judgment in the foreclosure action.

iff asks to have it declared he is the owner and to a two-thirds interest in the soil and freehold of known as Symes road. The defendants have not any sand or gravel therefrom, and the plaintiff's any, have not been interfered with.

Interest of plaintiff and the other mortgagors having closed, as well in the streets as in the other lands in the mortgages, he cannot maintain an action against the defendants for the removal of gravel and sand there-

action must be dismissed with costs.

APRIL 7TH, 1903.

DIVISIONAL COURT.

CAVANAGH v. CASSIDY.

Costs—Residence of Plaintiff—Ordinary Residence out of Jurisdiction—Temporary Residence in Ontario.

l by defendant from order of BRITTON, J., in (2 O. W. R. 143) reversing order of Master in (2 O. W. R. 27), which required plaintiff to give or costs.

Cook, for defendant.

Woods, for plaintiff.

Judgment of the Court (BOYD, C., FERGUSON, J., N, J.A.) was delivered by

C.—The decision of the Master ought not to have been disturbed, and should be restored. Rule 1198 governs the law, and the affidavits and evidence supply the facts. Plaintiff is a person ordinarily resident out of Ontario. Plaintiff is 34 years of age, and has for 34 years prior to the end of 1868 lived in the United States, where he followed the pursuits, and where live his relatives with whom he intended to make his home. For about six months he resided in Ontario, engaged in American stock-broking business. He is now, and was when the order was made, in business, but was expecting something that might happen which would keep him in this city and country. He cannot state under oath how long he will be here, and the result is, that he is merely a transient visitor, who may leave the country at any moment for his place of usual residence. Appeal allowed and order of Master restored. Costs allowed to defendant in the cause.

APRIL 7TH, 1903.

DIVISIONAL COURT.

VOIGT v. ORTH.

Judgment—Default of Defence—Writ of Summons—Service out of Jurisdiction—Order Fixing Time for Delivery of Defence—Informal Defence—Irregular Judgment—Order Dismissing Application to Set aside—Final Order—County Court Appeal.

Appeal by defendant from order of Judge of County Court of Essex in an action in that Court dismissing application by defendant to set aside a judgment against him for default of defence in an action on a foreign judgment.

F. E. Hodgins, K.C., for defendant.

E. S. Wigle, Windsor, for plaintiff.

The judgment of the Court (BOYD, C., FERGUSON, J., MACLAREN, J.A.) was delivered by

BOYD, C.—Both plaintiff and defendant are foreigners, but upon the plaintiff filing an affidavit that defendant had property in this Province of the value of \$200, the County Court Judge made an order allowing a writ of summons to be issued for service by notice on a foreigner out of the jurisdiction, and providing that defendant should have 12 days "within which to appear to notice of the writ and file his defence to the action." The writ was issued as a specially indorsed writ, and so no statement of claim was served with the notice (Rule 166). Within the twelve days defendant entered an appearance and therewith filed a defence in these words: "The defendant admits only \$103, but otherwise disputes plaintiff's claim in this action." . . . This step was taken in strict pursuance of the Judge's order, which was served upon defendant. It is a proper pleading according to Division Court standards, and is essentially a defence, though of somewhat novel simplicity. It was disregarded, however, and final judgment was signed for want of delivery of a defence, and execution issued thereon. Under the order defendant was not called on to deliver his defence, but only to file it, and with this defence on the record, the judgment is a nullity. According to proper practice there should be simply an appearance entered, to be followed by a statement of claim, unless defendant notifies plaintiff that he does not require such statement to be delivered: Rules 171, 243, 245. But plaintiff is bound by the terms of his order.

The County Court Judge's order dismissing the application to set aside the judgment contained a clause that on payment of \$5 in ten days defendant might move to set aside

the judgment on the merits. . . . This order was in its nature final, and not interlocutory, within the meaning of R. S. O. ch. 55, sec. 52, and an appeal from it lies. *Babcock v. Standish*, 19 P. R. 195, and *O'Donnell v. Guinane*, 28 O. R. 389, considered.

Appeal allowed. Costs of motion and appeal to be taxed to defendant and set off pro tanto against the amount admitted to be due to plaintiff.

BRITTON, J.

APRIL 8TH, 1903.

TRIAL.

ALEXANDER v. MILES.

Master and Servant—Injury to Servant—Factory—Defective System—Negligence—Findings of Jury—Workmen's Compensation Act.

Action by the administratrix of the estate of James Alexander to recover damages for his death, which occurred on the 2nd October, 1902, as the result of an accident in defendant's factory. It was proved and admitted that the death of James Alexander resulted from his being accidentally struck by a board pushed from below through the hole in the floor above by one William Miles, a servant and workman then in the employment of defendant; that James Alexander was, at the time and on the occasion of his being so struck, rightfully where he was, and that he was not guilty of any contributory negligence; that the hole in the floor was intended, and for a long time had been used, for the purpose of pushing through it boards from below to the floor above. It was alleged by defendant that she had a system of using this hole and of putting the boards up through it, which was a safe one and not dangerous to the workmen on the upper floor, and that this accident occurred through the negligence of William Miles in not following this system and in not obeying instructions, and that for such negligence of a fellow-workman plaintiff could not recover at common law or under the Workmen's Compensation Act. The jury, however, found that there was no system adopted which provided against the danger.

L. V. McBrady, K.C., and T. J. W. O'Connor, for plaintiff.

W. R. Riddell, K.C., and J. H. McGhie, for defendant.

BRITTON, J., held that the findings were not inconsistent, and were warranted by the evidence. The boards were constantly required for use by defendant on the upper floor of the factory. They were moved through this hole in the floor. This was a defective system of putting in place and using

what was constantly required. The using of this hole, placed there as part of the factory, as it was intended to be used, and as it was used, was attended with danger, and it therefore became the duty of defendant to protect the workmen by some plan or system, or at least to warn them when boards were to be pushed up. It is negligence in an employer not to make provision for protection of his workmen, and it is no answer that the workman is willing to assume all responsibility: see *Webster v. Foley*, 21 S. C. R. 580; *Smith v. Baker*, [1891] A. C. 348. Upon the answers to questions 4, 5, 6, and 7 there was liability under the Workmen's Compensation Act. Judgment for plaintiff for \$1,000 and costs.

BRITTON, J.

APRIL 8TH, 1903.

TRIAL.

STONE v. BROOKS.

Landlord and Tenant—Distress for Rent—Seizure when no Rent Due—Damages—Double Value—Property of Tenant in Mortgaged Chattels—Right of Action—Proceeding under Overholding Tenants Act—Estoppel—Chattel Mortgage—Default—Taking Possession—Agreement to Abandon—Breach—Measure of Damages.

On 14th September, 1901, plaintiff purchased the stock of a livery stable from defendant for \$2,500, paying \$800 cash, and giving a chattel mortgage on the goods purchased and other goods for \$1,700. The plaintiff also leased from defendant the livery stable premises for ten years at \$900 a year. The mortgage covered after-acquired property, and contained a provision that in case of default in payment, or if the mortgagor should attempt to sell or dispose of or in any way part with the possession of the goods, etc., or in case the mortgagee, for any good reason, should feel unsafe or deem the goods in danger of being sold or removed, the whole mortgage money should become due and the mortgagee should have the right to take possession.

On 13th February, 1902, defendant distrained for \$143.38, balance of rent alleged to be due up to 16th January, 1902, and seized all the property covered by the mortgage to realize \$1,600, the amount then alleged to be due thereon.

The plaintiff brought this action for illegal distress and seizure, alleging that no rent was due; that the seizure under the chattel mortgage was unnecessary; and that the action of defendant was not to secure himself, but to injure plaintiff.

The plaintiff also alleged that after the seizure an agreement was come to by which defendant was, in consideration of getting an assignment of accounts, to abandon the seizure and not to remove or sell the property. The accounts were

ned, and \$15 was paid on 13th and \$25 on 17th February, 1902, by plaintiff to defendant.

The jury found :

That no rent was due on 13th February, when the seizure was made.

That the value of the goods seized and sold for rent was \$690.

That plaintiff sustained \$417 actual damages by reason of the seizure and sale for rent.

That defendant on 13th February agreed to entirely satisfy both seizures in consideration of the assignment of goods amounting to \$162.

That by reason of the breach of that agreement plaintiff sustained \$1,859 damages.

That defendant had no good reason for feeling unreasonable in deeming the mortgaged goods in danger of being sold and removed.

John MacGregor, for plaintiff, moved for judgment for \$3,000, being double the value of the goods seized for rent, and \$1,859 damages for sale of mortgaged goods.

E. A. DuVernet, for defendant.

MITTON, J.—Upon the evidence and the findings of the jury there was no rent due. There was \$300 due for rent on 13th January, 1902, but plaintiff was entitled to credits amounting to \$309.50, and if all credits were applied on rent, there would be overpaid by \$9.50.

Plaintiff is entitled to damages, and he claims double the value of the goods sold for rent. The goods were not sold until 14th March. This action was commenced on 24th January, so the plaintiff cannot recover double value under the Statute. The value of the goods seized for rent and afterwards sold was \$690, and that is the amount plaintiff is entitled to recover on this branch of the case. The jury found that they arrived at the amount by deducting from the value of the goods seized the amount which they realized at the sale, \$273. As plaintiff did not get the \$273, defendant should not get credit.

The chattel mortgage to defendant does not, nor does the legal mortgage (on plaintiff's equity in the goods) to plaintiff, prevent recovery by plaintiff. Plaintiff was tenant in common with defendant, and at the least had a special property in the goods seized. Apart from what defendant did, plaintiff had an uninterrupted enjoyment of the property, and so has a right to maintain the action: see *Fell v. Whittaker*, L. R. 7 Q.B. 120. Defendant, having treated these goods as the

goods of plaintiff, cannot, if distress is wrongful, rely upon his chattel mortgage as a defence: see *Dedrick v. Ashdown*, 15 S. C. R. 227.

It is not necessary, in my view, to join plaintiff's wife as a plaintiff, but I give leave to add her if it should be necessary at any future stage.

Defendant contends that by proceedings before a County Court Judge under the Overholding Tenants Act, plaintiff is estopped from saying in this action that there was no rent due at the time of the seizure in February, 1902. I do not think there is any estoppel. This action was commenced on 24th February. Plaintiff is entitled to have his rights determined in this action as they then stood. The proceedings under the Overholding Tenants Act were commenced on the 1st April, when another gale of rent had become due. It was no part of the County Court Judge's duty to determine how the account for rent stood in February, nor could he determine as between the parties what is in question in this action.

Upon the other branch of the case, as to the property covered by the chattel mortgage and the sale of it, the Judge, after commenting on the evidence and the findings of the jury, continued:—

We now come to 13th February, 1902. I see no reason why defendant could not waive default and make the agreement which plaintiff alleges was made, and which the jury have found was made, to abandon the seizure. Plaintiff made the assignment of the accounts and the payments of \$15 and \$25, notwithstanding which defendant entered on the 20th and removed the chattels, breaking up plaintiff's establishment; and all the chattels were sold on or about 4th March. . . . The mortgagee took possession on 20th February in violation of his agreement to entirely abandon the seizure. . . . If defendant sold when he had no right to do so, the measure of damages is the extent of the mortgagor's interest in these goods, and as the mortgagor might have been able to work out the debt, or sell the property as a going concern, if he had not been interfered with, the damages are the difference between the real value of the goods to the mortgagor and the full amount of defendant's claim. . . . On this branch plaintiff is entitled to \$1,022.94, against which I allow on defendant's counterclaim \$145 for rent and use and occupation.

On the whole case judgment for plaintiff for \$1,567.94 and costs.

STREET, J.

APRIL 8TH, 1903.

TRIAL.

TRAVISS v. HALES.

and and Wife—Liability of Husband for Torts of Wife where Marriage before 1884—Libel.

Action against a husband and wife who were married on May, 1875, to recover damages for a slander uttered by wife in April, 1901. It was agreed that there should be judgment against the wife for \$1 and costs, and for the same against the husband if he should be held liable under the law as it stands for this tort of his wife, and that the parties should be in the same position as if the counsel for the husband had moved to have a nonsuit entered for him at the time upon the ground that he was not liable for the torts of his wife.

J. W. McCullough, for plaintiff.

J. A. McDiarmid, Lindsay, for defendants.

STREET, J.—The weight of authority is in favour of the view that at common law the husband was liable for the torts of his wife as a matter of principle, and not by reason merely of the fact that he was a necessary party to an action against her. See *Bacon Abr.*, tit. Baron et Feme, L.; *Head v. Buscoe*, 5 P. 484; *Wainford v. Heyl*, L. R. 20 Eq. 321; *Seroka v. Wattenburg*, 17 Q. B. D. 177; *Lee v. Hopkins*, 20 O. R. 100, and cases there cited. But see, to the contrary, *American v. Rogers*, 31 C. P. 195. If a direct liability at common law existed, there is nothing in sub-sec. 2 of sec. 3 of the Married Women's Property Act, R. S. O. ch. 163, sufficient to relieve the husband. The liability of the husband was a necessary part of the common law principle of the identity of husband and wife. The liability to be sued along with his wife and made liable in such an action for her torts is still maintained, to a limited extent, by sec. 17 of R. S. O. ch. 163, and that section continued without any limitation down to the present time, so far as persons married before 1st July, 1884, are concerned. Judgment for plaintiff for \$1 and the costs of the action on the High Court scale against both defendants.

APRIL 8TH, 1903.

DIVISIONAL COURT.

McLAUGHLIN v. RODD.

Costs—Residence of Plaintiff—Ordinary Residence out of Jurisdiction—Temporary Residence in Ontario.

Appeal by defendant from order of MEREDITH, C.J., in Chambers (2nd March, 1903) reversing an order of one of

the local Judges at Windsor requiring plaintiff to give security for costs.

E. S. Wigle, Windsor, for defendant.

R. U. McPherson, for plaintiff.

THE COURT (BOYD, C., FERGUSON, J., MACLAREN, J.A.) held that the order of the Chief Justice was well founded. The plaintiff had been in the country nearly three years, and was engaged in an enterprise as to a patent air brake which from the pleadings, it would seem, both parties admitted to be of importance and of financial promise. This was likely to keep him in the country for a long time, and the evidence was all that way, and repugnant to the idea of a mere temporary sojourn. He had no family associations or residence, according to his own evidence, which was not controverted, which would draw him to the States, though he might still be of American domicil. Appeal dismissed. Costs in cause to plaintiff.

APRIL 8TH, 1903.

DIVISIONAL COURT.

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

Writ of Summons—Service—Unincorporated Voluntary Association—International Association—Service upon Executive Officer in Ontario—Service on Members.

Appeal by defendant association from order of MEREDITH, J., in Chambers, ante 199, affirming order of Master in Chambers, ante 26, dismissing a motion to set aside the service of the writ of summons on one Carey for the defendant association.

J. G. O'Donoghue, for defendants.

C. A. Moss, for plaintiff.

THE COURT (BOYD, C., FERGUSON, J., MACLAREN, J.A.) held that service on Carey was not service on the association. but that service on the individual defendants was good service on the members of the association. Order varied. No costs.

APRIL 8TH, 1903.

DIVISIONAL COURT.

COBBAN MFG. CO. v. LAKE SIMCOE HOTEL CO.

Costs—Mechanics' Lien Action—Examination for Discovery—Disbursements—Counsel Fees—Professional Disbursements.

Appeal by defendants from order of FALCONBRIDGE, C.J., in Chambers, dismissing appeal from taxation by the

ior taxing officer at Toronto of defendants' costs of a mechanics' lien action.

A. E. H. Creswicke, Barrie, for defendants.

W. D. Gwynne, for plaintiffs.

The judgment of the Court (BOYD, C., FERGUSON, J., CLAREN, J.A.) was delivered by

BOYD, C.—The taxing officer disallowed defendants' costs examining an officer of plaintiffs for discovery. While it is competent to have such examinations in mechanics' lien actions, it is for the taxing officer to say whether the costs of such examination should be taxed against the opposite party. In this case he ruled that the examination was not a reasonable thing under the circumstances of the case, and from that there is no appeal (see also sec. 43 of the Mechanics' Lien Act).

A matter of more difficulty is, whether under sec. 42 the defendants can tax counsel fees as actual disbursements. The provision is, that when costs are awarded against the plaintiff, such costs shall not exceed an amount in the aggregate equal to 25 per cent. of the claims, besides actual disbursements. Where, as in this case, the solicitor is also the counsel, no question of actual disbursements can arise. The hand that pays and the hand to receive is the same. Disbursements are contrasted with costs in the section, and "disbursements" are used with reference to the solicitor, and not to the client. The taxing officer was right in holding that counsel fees could not be included in "disbursements." A small sum of \$5 was said to have been actually paid by the solicitor to a Toronto counsel on some interlocutory application, and that is, in effect, a disbursement, though not such a disbursement as would be properly payable by the solicitor by virtue of his office, but as agent of his principal: *Armour v. Kilmer*, 28 O. R. 618. The distinction between payments as agent and professional payments as solicitor is well marked in England as expounded in *In re Remnant*, 11 Beav. 603, 611; *In re Kingdon and Wilson*, [1902] 2 Ch. 242; *In re Backwell and Berkeley*, ib. 6. The "disbursements" of sec. 43, R. S. O. ch. 153, are restricted to professional disbursements, and do not include fees paid to counsel by the solicitor as agent of his client. The special Act as to liens incorporates by reference the ordinary procedure of the Court except as varied by the Act. Rules 1178 and 1179 provide for costs and for disbursements respectively, and refer to the tariffs in the appendix. Tariff A is that as to costs, and includes in its provisions the scale allowed as to counsel fees. Tariff B, as to fees and disbursements, provides, among other things, for the allowances to be paid to witnesses, which are strictly professional disbursements. Counsel fees are often the largest item in the bill

of costs, and if they were allowed in full, while other costs are reduced to 25 per cent. of the amount claimed, the purpose of the Act would be greatly frustrated.

Appeal dismissed without costs.

STREET, J.

APRIL 9TH, 1903.

CHAMBERS.

REX v. FORSTER.

Criminal Law—Conviction by Special Court under Ontario Liquor Act, 1902—Removal by Certiorari—Commitment after Certiorari Served—Discharge of Prisoner—Amendment of Proceedings—Conviction under Wrong Name—Idem Sonans—Adjudication—Sentence.

Motion by defendant for an order for his discharge from custody, on the return of a writ of habeas corpus. The defendant was convicted by the Judge of the County Court of Kent, at St. Thomas, under sec. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year and to pay a penalty of \$400. On the 3rd February, 1903, a warrant was issued under the hand and seal of the Judge for committing defendant to gaol pursuant to the conviction, and he was arrested and taken to gaol. On the 30th January, 1902, a writ of certiorari was issued directed to the Judge and the Crown County Attorney for Elgin, to return certain papers into the High Court, and was served on them on the 2nd February, 1903.

J. W. McCullough, for defendant.

J. R. Cartwright, K.C., for the Crown.

STREET, J., held that the proceedings against defendant were removed from the Court below by the certiorari, and the subsequent proceedings were void. The statute 2 Edw. VII. ch. 12, sec. 15, making the provisions of the Code respecting the amendment of proceedings before justices of the peace applicable to all cases of prosecutions under Provincial Acts, is intended to apply only to summary proceedings before justices, and not to proceedings under the Liquor Act of 1902. But, even if it applied here, it would not help the matter. Proceedings under that Act are not of the same character as those before justices, whose convictions during centuries of decisions have become subject to highly technical rules founded upon considerations no longer in many cases existing. The name of the informant appears on the present proceedings, and defendant has been prosecuted under a name (Foster) so nearly identical in sound with that which he

claims as his (Forster), that effect should not be given to an objection based on the omission of the letter "r" in his name in the conviction and other proceedings, especially where he appeared by counsel before the County Court Judge, and defended, under the name in which he was prosecuted. There was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings. There is no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. This would not be so in a conviction before a magistrate, because of a long established rule to that effect, but it is so in the order of a magistrate; see Paley on Convictions, 7th ed., 170. The Court is not, in this case, bound by decisions relating to magistrates' convictions, but is at liberty to apply a reasonable interpretation to the proceedings. See *Lindsay v. Leigh*, 11 Q. B. 456. But, as there was no authority in the Judge below to issue a commitment under which the prisoner is held, after the proceedings had been removed by certiorari, the defendant could be discharged. Order accordingly. No costs.

BRITTON, J.

APRIL 9TH, 1903.

TRIAL.

CAREW v. GRAND TRUNK R. W. CO.

Midway—Farm Crossing—Duty to Provide—Railway Act of 1888—Retroactivity—Special Statutes.

Plaintiff was the owner of the south half of lot 15 in the township of Emily, except the right of way of defendants, who had purchased land for their road in 1882. Plaintiff, owning the land on both sides of the railway, brought this action to compel defendants to construct a crossing so that plaintiff can properly work his farm.

R. Ruddy, Millbrook, for plaintiff.

W. R. Riddell, K.C., for defendants.

BRITTON, J., held that the undisputed material facts brought the case within *Ontario Lands and Oil Co. v. Canadian Southern R. W. Co.*, 1 O. L. R. 215, and there was nothing in the different statutes affecting the Midland Railway Company, by whom the portion of defendants' road in question was constructed, to render that decision inapplicable. Plaintiff could not merely as proprietor of lands along the railway invoke the aid of the original sec. 13, made part of the Act incorporating the Peterborough and Port Hope Railway Company, to compel defendants to construct a farm

crossing across the railway from one part to another of his land. Action dismissed without costs and without prejudice to any question affecting a claim to a way of necessity.

APRIL 9TH, 1903.

DIVISIONAL COURT.

NORTHMORE v. ABBOTT.

Will—Action to Set aside—Burden of Proof—Want of Testamentary Capacity.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., 1 O. W. R. 231, in favour of plaintiff in an action to set aside, for undue influence and want of testamentary capacity, the will of Hannah E. Fenwick, deceased.

T. D. Delamere, K.C., for defendant.

A. B. Cunningham, Kingston, for plaintiff.

THE COURT (BOYD, C., FERGUSON, J., MACLAREN, J.A.) dismissed the appeal with costs.

WINCHESTER, MASTER.

APRIL 11TH, 1903.

CHAMBERS.

KINGSTON v. SALVATION ARMY.

Parties—Unincorporated Voluntary Association—Service of Process on—Religious Body Holding Property in Ontario.

Motion by defendants "The Salvation Army" to strike out their name as defendants, on the grounds that they are not an incorporated body or a partnership; that they are under the sole control of William Booth, in whom (or in trustees for whom) all their property is vested; and that D. F. McAmmond is not a proper person to be served on their behalf, and William Booth has no agent in Canada upon whom process can be served. The action was brought to recover damages for injuries sustained by reason of a runaway horse frightened by the noise made by defendants McQuarrie and Austin while conducting religious services as members of the Salvation Army in the streets of the city of Hamilton. The noise was made by the beating of a drum. It appeared that D. F. McAmmond was a staff-captain having charge of the Army's work in Hamilton.

A. E. Hoskin, for applicants.

D. L. McCarthy, for plaintiff.

THE MASTER.—The Salvation Army is a religious body, acknowledged to be so by R. S. O. ch. 162, sec. 2 (3), provid-

that certain officers may solemnize marriages. The s also entitled to hold property under the Religious In-
 onns Act, R. S. O. ch. 307. The property purchased by
 my is first taken in the name of the Commissioner in
 o for the time being, and subsequently conveyed to
 n Booth. As the Salvation Army are entitled to hold
 o hold property of various kinds in this Province, they
 e sued and service may be effected upon them. De-
 of Divisional Court in Metallic Roofing Co. of Canada
 al Union No. 30, Amalgamated Sheet Metal Workers'
 ational Assn., 2 O. W. R. 183, distinguished. Motion
 sed. Leave given to defendants to enter a conditional
 ance. Costs in the cause.

HESTER, MASTER.

APRIL 11TH, 1903.

CHAMBERS.

AWA CANNING CO. v. DOMINION SYNDICATE.

—Third Parties—Indemnity or Relief over—Sale of Goods—
 Guarantee.

otion by defendants the syndicate for third party direc-
 against defendants the Strathroy Company, opposed by
 tter on the ground that no case for indemnity arises
 the circumstances shewn on the pleadings. Action to
 declared that the corn delivered by defendants to plain-
 s not the corn which was the subject of the contract
 between defendants the Dominion Syndicate and plain-
 and for repayment of \$9,564.92 improperly received by
 defendants, and damages for loss sustained by reason
 non-delivery of the corn contracted for, and damages
 oned by the collusive, improper, fraudulent and wrong-
 ts of defendants.

L. Drayton, for applicants.

E. Middleton, for defendants the Strathroy Co.

W. Eyre, for plaintiffs.

HE MASTER.—The question in issue between plaintiffs
 defendants is the quality of the corn sold to and pur-
 l by plaintiffs from the Dominion Syndicate. These
 ants admit that the quality was inferior when they
 and say that plaintiffs, knowing the fact, bought it at
 r price than would have been paid if it were of standard
 y. It may be that the quantity of inferior corn was
 greater than plaintiffs supposed from the inspection
 by them, and in consequence they have suffered loss
 gh the representations of the Strathroy Company. The

Dominion Syndicate allege a guarantee by the Strathroy Company to them as to quality. Under this guarantee defendants the Dominion Syndicate would have a right of indemnity or relief over in respect of any recovery plaintiffs may have as to the quality. Such indemnity or relief over may not arise, but, as the parties will have the same witnesses at the trial as they will require in the case of the third party trial, the usual order as to third party directions should be made.

WINCHESTER, MASTER.

APRIL 11TH, 1903.

CHAMBERS.

METALLIC ROOFING CO. v. JAMIESON.

Mechanics' Liens—Interest on Claim—Right of Lienholder to Recover—Computation.

A question as to interest arose upon the summary trial of a mechanic's lien action. Plaintiffs claimed interest on the amount found due from 8th September, 1902. This was objected to by defendants Mackenzie and Mann, on the ground that plaintiffs were, by virtue of the Mechanics' Lien Act, limited to the sum justly due to the person entitled to the lien.

W. N. Tilley, for plaintiffs.

A. W. Anglin, for defendants Mackenzie and Mann.

THE MASTER held, following *Johnson v. Boudry*, 116 Mass. 196, *Casey v. Weaver*, 141 Mass. 280, and *Trustees of Lutheran Church v. Heise*, 44 Md. 454, that interest, being an incident of the principal sum found due, and withheld by unreasonable delay in payment, is properly allowed and secured by the lien, but that the amount should be computed from the date of the commencement of the action.

WINCHESTER, MASTER.

APRIL 11TH, 1903.

CHAMBERS.

SMITH v. McDEARMOTT.

Discovery—Examination of Party—Action for Equitable Execution of Judgment—Questioning Plaintiff as to Matters Settled by Judgment—Absence of Defence Attacking Judgment.

Motion by defendant Lee to compel plaintiff's husband, one J. C. Smith, to attend at his own expense and submit to be examined and answer all questions relating to the account of the dealings between plaintiffs and defendants McDearmott, Evans, & Co., and to the settlement referred to in the

ination of plaintiff, and produce books, etc. Action by judgment creditor of defendants McDearmott, Evans, & for equitable execution. Plaintiff's husband was by not examined for discovery. He was asked to tell about transactions out of which the indebtedness represented the judgment arose, and refused to answer on the ground there was no plea of fraud or collusion in recovering the judgment.

W. D. Gwynne, for defendant.

W. N. Ferguson, for plaintiff and her husband.

THE MASTER held, following *Allan v. McTavish*, 28 Gr. 8 A. R. 440, that, as all that the plaintiff would have establish against all the defendants in respect of the judgment was that the former action had been brought, the recovery on it, and the date of its recovery, without attacking judgment defendants were not in a position to inquire the facts on which the recovery proceeded, and J. C. was within his rights in refusing to answer the questions asked. Motion dismissed. Costs to plaintiff in the case.

CHESTER, MASTER.

APRIL 11TH, 1903.

CHAMBERS.

PENDRITH MACHINERY CO. AND FARQUHAR.

of Goods—Claim of Stranger to Purchase Money—Interpleader—Ownership of Goods—Trial of Issue—Costs.

Application by one Logan for an order for leave to pay Court \$250, being the purchase money of a boiler sold him by the company, and claimed by Agnes Farquhar as belonging to her. The parties consented to a summary trial on matters of the issue between the claimants as to the right to the purchase money.

John Greer, for Logan.

C. A. Moss, for the company.

W. C. McKay, for Agnes Farquhar.

THE MASTER found the facts in favour of the company's claim. Order made that Logan pay over the \$250 to the company, less his costs of his application to pay in (to be paid by the company), and that the claimant Agnes Farquhar pay to the company the sum deducted by Logan for costs, and the company's costs of the trial of the issue.

STREET, J.

APRIL 11TH, 1903.

CHAMBERS.

RE SHORTREED.

Will—Bequest to Widow—Maintenance of Children—Absence of Trust in Favour of—Rights of Children in Respect of Fund—Rights of Child Born after Will Made.

Motion by the widow and executrix of John Shortreed for an order under Rule 938 construing clauses in the will of the testator. The testator (1) appointed his wife and two brothers Robert and Gideon executors; (2) bequeathed to Robert and Gideon \$300 to be divided equally between them for their trouble as executors; (3) bequeathed to his wife all his household furniture, etc., and all moneys to be received from any insurance upon the testator's life, "my said wife to support and maintain during their minority my children living at my decease," and the bequest to be in lieu of dower and of compensation for her trouble as executrix; (4) devised and bequeathed all the residue of his estate to his executors in trust to convert into money and to divide it among his three children, four-tenths to his son, and three-tenths to each of his two daughters, such share to become vested upon his decease, but to be payable to each child at 21; (5) directed that until each child should attain 21 his executors should invest the share of each and pay the income, so far as might be necessary, to his wife from time to time for the educational advancement in life of his "said children;" (6) directed that, in the event of the life insurance moneys not being paid to his wife, she should receive from his other estate such sum as should be necessary to make the whole of the bequest to her \$5,000, or such less sum as shall make the bequest equal to the shares of each of my daughters, "and the shares and proportions herein bequeathed to my said sons and daughters shall for this purpose be abated proportionately to that extent."

A. H. Marsh, K.C., for the applicant.

H. Guthrie, K.C., for the co-executors.

F. W. Harcourt, for the infant Ruth Shortreed.

W. R. P. Parker, for the other infants.

STREET, J.—The position of the widow and children under this will is the same as that which was under consideration in *Allen v. Furness*, 20 A. R. 34. That case and those referred to there seem to establish that no trust in favour of the children is created, although the children are

without rights against the fund under certain circumstances.

The testator received all insurances upon his life during lifetime; there was, therefore, nothing for the bequest to his wife of insurance moneys to take effect upon. The will, however, which happened has been provided for by a part of the will.

The testator had only three children born at the date of the will; one more was born in his lifetime after the date of the will. Under the terms of the will, the three only take the residuary estate, and the fourth takes no share in either principal or income: *Re Emery's Estate*, 3 Ch. D. 300; *Re Henson*, [1897] 1 Ch. 75, 81.

Order accordingly. Costs of all parties out of the estate.

APRIL 11TH, 1903.

DIVISIONAL COURT.

McARTHUR v. CLARK.

Conversion and Sale of Goods—Recovery of Judgment against Debtor — Failure to Realize on Execution — Subsequent Action against Vendee—Levy of Small Part—Application as Part Payment.

Appeal by defendant from judgment of Judge of County Court of Bruce in favour of plaintiff in an action in that Court. In January, 1896, plaintiff made a bill of sale to her daughter Charlotte McPhail of certain cattle, and on 2nd November, 1901, the daughter sold the cattle to defendant, and paid her for them. After this sale, and with knowledge of the same, plaintiff recovered judgment against her daughter and the daughter's husband for the value of the cattle in an action of trover. Execution was issued upon this judgment, but was returned nulla bona, except as to \$33, a small portion of it. Plaintiff then demanded the cattle from defendant, who refused to give them up. Plaintiff then brought an action for damages against the defendant as purchaser.

J. Idington, K.C., for defendant.

J. H. Ritchie, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., and J. J. BRITTON, J.) was delivered by

J. J. BRITTON, J.—A recovery in trover without satisfaction does not vest the property in defendant. It merely ascertains the time upon payment of which to plaintiff the property will be required to be returned to defendant from the time of the conversion. The levy of \$33 of the damages was merely a part

payment, which may be taken into account in reduction of damages upon a further action. Defendant's refusal to deliver up the cattle was a new wrong, for which plaintiff is entitled to damages. *Brinsmead v. Harrison*, L. R. C. C. P. 584, L. R. 7 C. P. 547, and *Ex p. Drake*, 5 Ch. D. 866, followed. Appeal dismissed with costs.

APRIL 11TH, 1903.

DIVISIONAL COURT.

ONTARIO PAVING BRICK CO. v. BISHOP.

Mechanics' Liens—Claim of Owner against Contractor—Abandonment of or Discharge from Work—Mistrial—Reference "ck."

Appeal by defendant Singer from judgment of Neil McLean, an official referee, in a case under the Mechanics' Lien Act. Defendant Singer was the owner; defendant Bishop the contractor; plaintiffs and others had furnished work and material which had gone into the buildings under contract. Singer set up in his statement of defence that Bishop had abandoned the work, and in the alternative that he had been discharged from it, and that the completion of the work had cost much more than the contract price. The referee confined the parties to evidence as to the amount of the work done and the payments made upon it, and refused to receive evidence as to damage sustained by Singer. Under the terms of the contract, in the event of the contractor abandoning the work or being discharged from it by the architect, the cost of completing it was to be charged to the contractor, and he was to pay any deficiency to the owner.

W. E. Middleton, for defendant Singer.

F. C. Cooke, for defendant Bishop.

W. H. Irving, for plaintiffs.

F. E. Hodgins, K.C., for the Rathbun Company, lienholders.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The claim of the owner against the contractor for the additional cost, after first setting aside twenty per cent. of the value of the work done, is one upon which he should succeed, provided he can establish that the contractor either abandoned the work or was properly discharged from it. The other parties set up that the work was improperly taken out of the contractor's hands against his will. The question was one to be tried before the referee, upon the

lings. He, however, considered that it was not before

There was a misunderstanding between him and the
 sel as to what was intended to be admitted. Order
 e setting aside judgment and referring the case back to
 referee to be tried out. Costs of appeal and reference
 to be dealt with as part of the costs of the cause by the
 ee, and paid by the unsuccessful party upon the refer-
 back.

APRIL 11TH, 1903.

DIVISIONAL COURT.

PRING v. WYATT.

*Malicious Prosecution — Reasonable and Probable Cause—Nonsuit—
 Search Warrant — Theft — Information not Charging Crime—
 Amendment.*

Re-argument of case reported ante 22.

Appeal by defendant from a judgment of nonsuit by
 Junior Judge of the County Court of Middlesex in an
 n for malicious prosecution.

On 20th February, 1902, defendant, having with him a
 e dog, was passing plaintiff's house, when plaintiff and
 son claimed the dog as theirs and took possession of it.
 ndant went to a magistrate and stated the facts, where-
 the magistrate drew an information stating that plain-
 did on that day "unlawfully have and keep in his posses-
 and take away a black collie dog, the property of the
 olainant," which was sworn to by defendant, and upon
 e magistrate issued a search warrant and delivered it to
 nstable, who took the dog out of plaintiff's possession,
 ntiff insisting that the dog was his. The constable then
 an information against plaintiff, charging that on the
 February, 1902, he "unlawfully did have and keep in
 possession a black collie dog, the property of " defendant.
 ummons was issued by the magistrate, and both parties
 ared before him. There was evidence to shew that at the
 est of defendant and his counsel the information was
 ended by inserting the words "steal and take away." The
 then proceeded, and the magistrate dismissed the charge,
 ing a note that "the charge of theft" was dismissed.
 ntiff then brought this action for malicious prosecution.

F. H. Moss, for plaintiff.

R. Meredith, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J.,
 EET, J., BRITTON, J.) was delivered by

STREET, J.—The defendant, having merely stated the facts of the case to the magistrate, and having stated them fairly, was not liable for the erroneous view of the magistrate that he had jurisdiction to issue a search warrant, nor for the subsequent action of the magistrate in summoning plaintiff before him in order apparently to dispose of the question as to the property in the dog. But when the proceedings began before the magistrate the plaintiff's counsel pointed out that no criminal offence was charged, and that the magistrate had therefore no jurisdiction; and there is evidence that defendant assented to the alteration in the information which then distinctly charged plaintiff with theft, and to the prosecution of plaintiff upon that charge. The real question in the action was not whether defendant believed that the dog was his, but whether he believed that plaintiff had stolen him, that is to say, had taken him without any belief that he had a right to take him. The trial Judge should have left the case to the jury, telling them that, if they found that defendant had authorized the charge of theft, and if he honestly believed, at the time of the hearing before the magistrate when the information was amended, that plaintiff had stolen the dog, they should find for defendant; otherwise, they should find for plaintiff. The case should not have been taken from the jury, under the circumstances, upon the ground that reasonable and probable cause for a criminal prosecution had been shewn: *Brown v. Hawkes*, [1901] 2 Q. B. 718; *Munroe v. Abbott*, 39 U. C. R. 83; *Macdonald v. Henwood*, 32 C. P. 433; *Patterson v. Scott*, 38 U. C. R. 642; *Grimes v. Miller*, 23 A. R. 764.

Appeal allowed with costs and new trial ordered. Costs of former trial to plaintiff in any event.

APRIL 11TH, 1903.

DIVISIONAL COURT.

WEBB v. CANADIAN GENERAL ELECTRIC CO.

Master and Servant—Injury to Servant—Workmen's Compensation Act — Negligence of Fellow Servant — Person Intrusted with Superintendence—Evidence for Jury.

Motion by plaintiff to set aside the nonsuit by **MEREDITH, J.**, at the trial at Peterborough, and for a new trial, in an action under the Workmen's Compensation Act. According to plaintiff's evidence, he was working in a narrow trench, with a wall on one side and a line of rails on the other, in a building of defendants. The line of rails passed through the building from east to west, and connected a building to the east, in which material was kept, with other buildings to

est, and the line of rails was used for the purpose of
 ing truck loads of material from one building to the
 Plaintiff was working in the trench with his back to
 or and about 15 feet from it, when a man who was
 ing with him passed between him and the wall, and he
 over with his arm on the track to steady himself.
 s moment a heavy truck, laden with wire, pushed by
 men, which had come through the door behind him,
 at his knowledge and without any warning to him,
 over his arm and injured it. He said that he had
 to the east a few minutes before, and that the door
 osed. There was evidence that a man named Rome
 e duty of superintending the transfer of the wire from
 rt of the works to the other, and that he, in turn, was
 the general control of one Drew; that just before the
 nt Rome went up to Drew and spoke to him and then
 out the peg over the latch and opened the east door,
 irected some men to push the car through it; that Rome
 rew were both in a position to see the plaintiff at work,
 hat no warning was given to him.

R. Riddell, K.C., for plaintiff.

M. Dennistoun, Peterborough, for defendants.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRIT-
 J.) held that there was evidence to go to the jury that
 accident was caused by negligence on the part of Rome,
 hat Rome was a person in the service of defendants who
 superintendence intrusted to him, and that his negli-
 took place whilst he was in the exercise of such super-
 endence. Order made setting aside nonsuit and directing
 trial with costs of former trial and this motion to be
 oy defendants.

APRIL 11TH, 1903.

DIVISIONAL COURT.

MCGHIE v. RABBITS.

*Appal and Agent — Work Done by Order of Supposed Agent —
 Action for Price of—Failure to Prove Authority of Agent.*

appeal by defendants from judgment of Judge of County
 of Hastings in favour of plaintiff upon the findings
 of the jury in an action to recover the price of some repairs
 by plaintiff upon certain buildings upon the order of
 Thompson, whom plaintiff alleged to be defendants'

. B. Northrup, K.C., for defendants.

. G. Porter, Belleville, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that there should have been a nonsuit. Sarah McAnnany, the widow, was the sole trustee of her deceased husband's estate, and was charged with the duty of collecting the rents, and, after first paying for necessary repairs out of them, of dividing them between herself and her daughter, the defendant Frances Rabbits. These duties she delegated to Thompson by a power of attorney, and Frances Rabbits did not object to her doing so, but there is no evidence that she gave him any authority to pledge her credit. Thompson incurred debts for repairs, instead of paying for them out of the rents, as he should have done, and gave notes for the debts signed by him as attorney for Sarah McAnnany. The \$77.71 claimed by plaintiff is the balance of this debt, and it was all incurred before her death. The \$141.05 forming the remainder of the claim was incurred by Thompson after the death of the widow, after he had been notified by Frances Rabbits that his authority under the power of attorney had come to an end on the death of the widow, and without the pretence of any authority to bind either the Union Trust Company or the infants, the other defendants. Appeal allowed with costs and action dismissed with costs.

THE TORONTO WEEKLY REPORTER.

(TO AND INCLUDING APRIL 18TH, 1903.)

II. TORONTO, APRIL 23, 1903. No. 15.

ESTER, MASTER. APRIL 14TH, 1903.

CHAMBERS.

EMPIRE LOAN CO. v. McRAE.

*Performance—Contract for Purchase of Land—Judgment for
ment of Price—Extension of Time—Payment on Account—
eiture—Relief against—Final Order of Sale.*

ion by plaintiffs for a final order of sale in an action
ors for specific performance of a contract for purchase

On the 13th November, 1902, a judgment was pro-
l directing specific performance, declaring that de-
had accepted the title to the land, and appointing a
payment of the money, \$4,578.45. It was agreed by
ties that upon defendant paying \$500 the time for
the whole sum should be extended until 26th March,
nd the judgment was issued in these terms. The
as paid. The agreement provided that in case the
of the \$4,578.45 was paid on or before the 26th
it would be accepted in full, but in default of pay-
such balance on that date, defendant should forfeit
0. Defendant not having paid the balance, this ap-
n was made.

E. Middleton, for defendant, asked liberty to pay only
with subsequent interest and costs, in full.

O. Scott, for plaintiffs, contra.

MASTER.—The plaintiffs, coming to this Court for
ce, must deal equitably with defendant, and I hold that
g \$500 from him in good faith on his purchase, and
g to give him credit for it because he happened to be
or two behind in paying up the balance, would not
able, notwithstanding that his agreement was to allow
e forfeited. This Court has always relieved against

forfeiture, and will do so where the parties can be placed in the same position they would have occupied had the agreement been carried out within the time limited.

I will permit defendant to pay the \$4,078.45 within one week from this date, together with interest on that sum from the 26th March, 1903, until paid, and the costs of this application, and extend the time under the judgment until that time. In default of such payment, the final order of sale to issue.

WINCHESTER, MASTER.

APRIL 14TH, 1903.

CHAMBERS.

QUANTZ v. QUANTZ.

Solicitor—Authority to Bring Action—Retainer—Instructions to "Collect"—Subsequent Instructions—Assignment of Annuity and Judgment—Setting aside Proceedings—Costs.

Motion by plaintiff to set aside the writ of summons and all subsequent proceedings with costs to be paid by the solicitor instituting such proceedings, on the ground that the same were taken without instructions from plaintiff.

The plaintiff, a woman of 87 years, being entitled under her husband's will to an annuity of \$100 a year payable by her son, the defendant, and not having been paid it, sent for the solicitor, who went to see her at her daughter's house, when the plaintiff explained to him the position of affairs, and requested him to arrange them for her. She then signed a written memorandum authorizing the solicitor to collect all arrears of dower and annuity, etc., and promising to pay the solicitor his lawful costs, charges, and expenses.

The solicitor at once began this action, and served the defendant with the writ of summons. Shortly afterwards he was told by plaintiff's son-in-law that the whole matter had been settled between plaintiff and defendant. The solicitor then called upon plaintiff and obtained from her written instructions to proceed with the action, and a power of attorney to act for her. He then again wrote to defendant, and proceeded to file a statement of claim, which he served by posting in the office of the clerk of records and writs, there being no appearance, and, no defence being delivered, he signed judgment against defendant for \$1,464.77 and interest and \$36.82 costs, and issued writs of fi. fa. and placed them in the sheriff's hands. The solicitor afterwards made plaintiff an

ce of \$50 and took from her an assignment of the an-
and of the judgment and a promissory note as security
e loan and for his costs.

M. Higgins, for plaintiff.

E. Jones, for defendant.

E. Middleton, for the solicitor.

THE MASTER.—The solicitor by his own admissions brings
lf within the cases as to obtaining security for costs in-
ce, for there was not due to him when he took the secur-
100 for costs—scarcely half that sum. No bill of costs was
up or explained to the client. She was entirely ignor-
such things. Had the solicitor been dealing with a
of business, he scarcely would have ventured to have
as he did with this woman of 87 years, not accustomed
h business. The note, under the cases referred to in
icitor, ante 268, is only security at the most for the \$50
whatever costs were due by her to him up to that date.
so *Hope v. Caldwell*, 21 C. P. 241; *Robertson v. Cald-*
31 U. C. R. 143; *Atkinson v. Gallagher*, 23 Gr. 201;
aith v. Irving, 8 O. R. 751; and *Uppington v. Bullen*,
& War. 184.

he solicitor obtained from defendant \$100 cash on 18th
er, 1901, which he sent to plaintiff the same day. He
obtained from defendant a note for \$159.59, being the
nt of plaintiff's note and interest for one month, pay-
n one month from 14th October, 1901, with which to
up plaintiff's note for \$157.69 dated 11th April, 1901,
ue 14th October, 1901. This note given by defendant
der the circumstances, of no higher value or greater
y than the one executed by plaintiff. The assignment
annuity by plaintiff to the solicitor is also affected by
isions above mentioned. . . .

he plaintiff, while most emphatic in her belief that she
e solicitor no authority to issue a writ against her son,
doubtedly sign two authorities. It may be she did
derstand their full meaning. Certainly as to the first
not authorize the solicitor to issue the writ herein: *At-*
v. Abbott, 3 Drew. 251; *Wray v. Kemp*, 26 Ch. D. 169.
st retainer signed by plaintiff and produced by the soli-
omes within these decisions, but the second retainer, in
inion, is binding on plaintiff. I cannot, therefore, com-
e solicitor to pay the costs of this suit.

he plaintiff desires to dismiss her action against defen-
. . . . An order will be made setting aside the writ.
ment, and executions; no costs to any of the parties.

MEREDITH, J.

APRIL 14TH, 1903.

TRIAL.

ST. MARY'S CREAMERY CO. v. GRAND TRUNK R.
W. CO.*Railway—Carriage of Goods—Injury to Goods by Negligence—Shipping Bill—Bill of Lading—Conditions Limiting Liability—Insurance on Goods.*

Action for damages for loss of butter shipped by plaintiffs from St. Mary's, Ontario, to Manchester, England, under a "through" contract made with defendants.

J. Idington, K.C., and L. Harstone, St. Mary's, for plaintiffs.

W. Cassels, K.C., and Forster, for defendants.

MEREDITH, J.—Plaintiffs' cheese and butter are sent in large quantities to Manchester, upon through contracts made with defendants. The dealings between the parties in regard to such carriage have been large and have extended over some length of time. Such dealings have been and are conducted in this manner. Plaintiffs apply to defendants' agent at St. Mary's for a through rate, and for space upon a steamship for their goods, and, upon being satisfied as to these things, send them, with a shipping bill, signed in their behalf to their authorized officer or servant, to defendants' receiving sheds or cars at St. Mary's. Upon receipt of the goods, the defendants' agent at St. Mary's delivers to plaintiffs a formal bill of lading, and thereafter the goods are despatched.

The plaintiffs' course of business has been, and is, to indorse the bill in favour of their agent at Manchester, and forward it by mail to him, and also to send a telegraphic despatch to him, apprising him of the shipment, so as to give him timely notice, in order that he shall arrange for the receiving and sale of the goods, and that he shall effect insurance upon them. The insurance is of a somewhat different character from that with which most of us are familiar. It was, and is, effected in Manchester, through the plaintiffs' agent there. A policy of a very general character was obtained from the Baden Marine Insurance Company, Limited, of Mannheim, Germany, dated at Manchester on the 13th day of December, 1900, under which that company took upon itself insurance of the plaintiffs to the amount of £10,281; and agreed and declared that the insurance should be (lost or not lost) at and from "by rail to Portland and for Halifax and for St. John thence to U. K. ports," and that the subject

should be, and is, upon "butter and for cheese, as in-
 may appear, to be declared on receipt of invoice, and
 of lading, at market value with 10 per cent. added,
 per any one steamer £3,000." There are then printed
 conditions in which the company promises and agrees that the
 insurance shall commence when the goods are laden on board
 a ship, or vessel, craft, or boat, as above, and continue
 until discharged and safely landed at as above, and that the
 risks and perils which (among others specified) the in-
 surers are to bear and take, are "all other perils, losses, and
 damages that have or shall come to the hurt, detriment, or
 loss of the aforesaid subject matter of this insurance or
 part thereof." And in the margin is attached a slip,
 printed and partly written, in these words: "In the event
 of damage prior to declaration held covered at market
 value 10 per cent. added." And in the margin are written
 the words: "This policy does not cover any loss or damage
 caused by an interruption in the working of the refrigerator
 machines."

On the receipt of the telegram announcing the ship-
 ment the plaintiffs' agent at Manchester made "declaration"
 with the insurers of the goods, and thereupon they seem to have
 been covered by the policy. Under the written words of
 the policy, and notwithstanding the printed ones quoted, the
 insurance, after declaration, seems to have been, lost or not
 by rail from St. Mary's to Portland, and thence to any
 place in the United Kingdom of Great Britain and Ireland
 to which the particular goods were shipped.

The goods in question were delivered to the defendants
 on the 16th day of April, 1901, to be carried by them, by rail,
 from St. Mary's to Portland in the State of Maine, and thence,
 by way of Liverpool, to Manchester. On the 18th day of
 the month they were injured, to the extent of about \$488,
 through the negligence of the defendants' servants while in
 charge over the defendants' railway, in the Province of Que-
 bec, on the way to Portland.

On the 19th day of the same month the plaintiffs sent
 their agent this message: "We have shipped eighty boxes
 of butter by the steamship Numidian; declare insurance;"
 and the insurance seems to have been effected accordingly;
 neither principal nor agent having any notice of the injury
 to the goods.

On the 23rd day of the same month the plaintiffs wrote
 their agent to return the bill of lading, and "cancel the
 declaration you may have made for marine insurance," as they
 had been advised that the goods had been destroyed in an
 accident on the way to Portland.

On the 26th of the same month the plaintiffs wrote again to the agent, countermanding the instructions to cancel the insurance, as, "since writing to you on the 23rd we find on reference to our marine insurance policy, that it covers the goods in transit to Portland as well as from that point."

The agent on receipt of the letter of the 23rd, and before receiving that of the 26th, cancelled the declaration, so that, as he says, the plaintiffs are precluded from making a claim upon the insurers. . . .

It is very clear that plaintiffs were bound by the terms of their shipping bill, signed by them and handed to defendants' agent before he would receive the goods for defendants as carriers, if accepted by defendants and not superseded by the bill of lading. This bill requested defendants, over plaintiffs' signature, to receive the goods in question, "subject to the terms and conditions stated above and to those on the other side of this shipping note." One of the conditions on the other side was: "13. In case of any loss or damage to goods for which this company or connecting lines or other carriers may be liable, it is agreed that the company or line or carriers so liable shall be given the benefit of any insurance effected by or for account of the owner of said goods and shall be subrogated in such rights before any demand shall be made on them in respect of such loss or damage, and in case of any liability whatsoever, the company shall only be liable for the invoice value of the property at the point of shipment." . . .

As to the bill of lading there seems to be no doubt, upon the authorities, that its terms are binding; that it contains the contract, or at least the written evidence of the contract: see *Lerdue v. Ward*, 20 Q. B. D. 475; *Parker v. South Eastern R. W. Co.*, 2 C. P. D. 416; *Watkins v. Rymill*, 10 Q. B. D. 178; *North-West Transportation Co. v. McKenzie*, 25 S. C. R. 38. . . . Even if it could be found as a fact—a finding I should be unable to make—that none of the plaintiffs' officers had read, or was aware of, the terms of the bill, yet I cannot doubt that plaintiffs would be bound by its conditions.

One of the conditions, plainly printed upon the face of the bill of lading, applicable to the service until delivery at the port of Portland, is in these words: "The shipper must insure all insurable property, and in case of any loss for which the Grand Trunk Railway Company or its connections are liable, the company or carrier so liable shall be entitled to the benefit of such insurance in estimating the damages to be paid by such carrier, and the insurer shall not be subrogated to any rights against such carrier."

on its face, it appears that plaintiffs were fully insured against the loss that has happened, and it is difficult to see, from the evidence which has been adduced, how the insurers could be relieved by them from liability; or, if so, that such relief would relieve them from the whole effect of condition viii. They are bound by it. And little, if anything, could be said against the fairness of a conclusion that plaintiffs' action is barred by reason of this condition, that is, assuming the condition to have been validly effected and either to be still in force or to have been released by plaintiffs. . . .

In the case must be dealt with according to law, not according to any one's notions of fairness; and the first question is what was the contract for the carriage of the goods? This is a question of fact, and, upon the whole evidence, I think the whole contract is contained in the bill of lading, and the terms and conditions of the shipping bill do not detract from it. . . .

Condition viii. of the bill of lading has not been complied with by the plaintiffs. Is it binding upon them, and, if so, does it wholly relieve defendants from liability, or give them a defence against plaintiffs? . . . Does it apply to a loss through negligence attributable to defendants, and, if so, is it made of no effect by sec. 246 of the Railway

Act? These cases have gone to an extraordinary length in excluding a condition limiting liability for loss occasioned by the negligence of defendants or their servants.

In reference to *Mitchell v. London, etc., R. W. Co.*, L. R. 10 Q. B. 256; *Puce v. Union, etc., Co.*, 19 Times L. R. 378; *Anchor Line v. Sutton*, [1891] 1 Q. B. 619; *Sutton v. Anchor Line*, 15 App. Cas. 144; *Phillips v. Clark*, 2 C. B. N. S. 601; *Gerald v. Grand Trunk R. W. Co.*, 4 A. R. 601.]

These cases constrain me to hold that condition viii. applies to defendants' liability as insurers, and not their liability for negligence attributable to them. Otherwise, I would have held that "any loss" for which defendants were liable included a loss caused by negligence attributable to them: see *Richelieu Navigation Co.*, 15 A. R. 647, 18 S. C. R. 100; *Robertson v. Grand Trunk R. W. Co.*, 24 S. C. R. 100.

Now assuming that the condition covers loss through negligence, does the Railway Act preclude defendants from recovering the advantage of it?

Section 146 is clumsily framed and worded, but, upon the whole, it seems to be now considered that (so far as the cases here involved goes) it precludes defendants from

contracting themselves out of liability for negligence in the cases therein provided for, that is, by "any notice, condition, or declaration;" the only question in this case being whether the words "notice, condition, or declaration" cover condition viii.

[Reference to Grand Trunk R. W. Co. v. Vogel, 11 S. C. R. 612; Robertson v. Grand Trunk R. W. Co., 24 S. C. R. 612; The Queen v. Grenier, 30 S. C. R. 42.]

The Vogel case is not overruled, but is yet an authority binding upon this Court. If, however, I am at liberty to give effect to my opinion upon the question, it is that the Vogel case was rightly decided. . . .

It comes to this: either condition viii. does not apply to loss through defendants' negligence, and so is no defence to the action or ground of counterclaim; or it does so apply, and, if so, is made of no effect by the enactment.

[Reference to Willcocks v. Pennsylvania R. R. Co., 166 Pa. St. 81, 184; Rintoul v. New York R. R. Co., 17 Fed. R. 905; Providence v. Moore, 150 U. S. 99; Shouler on Carriers, secs. 450, 464, 465; Elliott on Railroads, vol. 4, sec. 1509.]

Judgment for plaintiffs for \$488 damages and costs of action.

MACMAHON, J.

APRIL 14TH, 1903.

TRIAL.

BANK OF MONTREAL v. LINGHAM.

Limitation of Actions—Promissory Notes—Indebtedness to Bank—Acknowledgment by Deed—Conversion of Simple Contract Debt into Specialty—Revival of Debt—Release—Accord and Satisfaction.

Action to recover a money demand based upon two promissory notes dated respectively 6th and 27th March, 1884, both at 3 months, for \$35,000 and \$25,000 respectively, and upon a deed executed by defendant dated 7th June, 1884, whereby defendant acknowledged that he owed plaintiffs \$58,875.52.

Defendant pleaded the Statute of Limitations and accord and satisfaction.

W. Cassels, K.C., and A. W. Anglin, for plaintiffs.

C. H. Ritchie, K.C., and W. B. Northrup, K.C., for defendant.

MACMAHON, J.—The overdue indebtedness of defendant to the plaintiffs was on the 7th June, 1884, about \$88,875.52,

trust for which they held the guarantee of defendant's
for \$30,000. The \$88,875.52 included the two prom-
notes for \$35,000 and \$25,000.

trust deed dated 7th June, 1884, to which defendant's
defendant himself, an agent of the plaintiffs as trust-
the plaintiffs, were parties, it was recited that defend-
debted to his father in \$10,000 and to plaintiffs in
2, or thereabouts, and that the father owned and
ain lands as security for the \$10,000; and the father
such lands (in the State of Minnesota) to the trust-
ure first to the father his \$10,000, and next to plain-
\$58,875.54; and in trust to sell, etc.

th July, 1893, defendant, by deed reciting the trust
th June, 1884, released to plaintiffs all his interest
nds aforesaid. . . .

Lingham, defendant's father, held the Minnesota
security for the \$10,000 owing him by his son, the
t, which remained a first charge under the trusts in

Defendant alleged that the \$10,000 note which his
d indorsed, and for which the latter held security
Minnesota lands, had been paid by him. And (Job
having died) this statement seems to have been
as true by all the other heirs of Job Lingham, for
ased all their interest in the lands to the plaintiffs.

General manager of plaintiffs stated most positively
e never was any agreement between himself and de-
n the nature of an accord and satisfaction as sworn
latter. The defendant's acts in 1893 shew, I think,
d not at that time consider that there was any agree-
between plaintiffs and himself which would form an
d satisfaction.

Lingham was not the actual owner of the lands when
ed them in trust to secure the debt due by defendant
ffs. The recital in the deed states that he owns and
lands for the debt due to him by defendant. And
then an acknowledgment by defendant of the amount
ebtedness to plaintiffs, and the giving of security on
for the indebtedness so acknowledged to be due.
no covenant to pay.

reference to *Marryat v. Marryat*, 18 Beav. 227; *Isaac-
erwood*, L. R. 3 Ch. 225; *Jackson v. North Eastern*
, 7 Ch. D. 573, 585.]

ase in hand comes within the principle laid down in
decisions, and it must be held that the acknowledg-
defendant by the recital in the trust deed of the debt
e plaintiffs did not convert it into a special debt.

Then, the debt being barred by the statute on the 8th June, 1880, did the release by defendant to plaintiffs in July, 1893, revive the debt? If the \$10,000 note was paid by defendant, then Job Lingham at the time of his death had no interest in the Minnesota lands. That would be the proper finding. . . . If Job Lingham had no interest in the lands, plaintiffs could sell free from his claim.

But, even assuming the defendant had not paid the \$10,000 note, the release to plaintiffs in 1893 of his interest in the lands—which would necessarily include his interest as one of the heirs of Job Lingham in the \$10,000—and the subsequent sale in August, 1896, of timber valued at \$5,500 from the lands, his share of which the plaintiffs credited on their claim against him, was merely permitting the plaintiffs to realize an additional sum from the same security, which they held for defendant's debt.

The only object plaintiffs had in procuring the release from defendant, and his only intention in granting a release was "in order to avoid the expense of a sale." There was nothing in defendant's act in executing the release from which an intention could be implied to pay the debt and so waive the statutory bar.

Action dismissed with costs.

APRIL 14TH, 1903.

DIVISIONAL COURT.

HOLNESS v. RUSSELL.

Deed—Conveyance of Land—Cutting down to Mortgage—Improvidence—Fraud.

Appeal by plaintiff from judgment of BRITTON, J., 1 O. W. R. 655, dismissing action to set aside a conveyance of land and a bill of sale for improvidence, or for leave to redeem.

E. Coatsworth, for plaintiff.

G. F. Shepley, K.C., for defendant.

THE COURT (BOYD, C., FERGUSON, J.) dismissed the appeal with costs, not being able to find any ground upon which to interfere with the findings of the trial Judge.

APRIL 14TH, 1903.

C.A.

REX v. KARN.

Mal Law—Offering or Advertising for Sale Medicine for Improper Purposes—Evidence—Inference from Wording of Advertisements—Functions of Judge and Jury—Case Reserved after Acquittal—Misdirection—New Trial.

Crown case stated by the Chairman of the General Sessions of the Peace for the County of York.

The case was heard by MOSS, C.J.O., OSLER, MACLENGARROW, MACLAREN, JJ.A.

R. Cartwright, K.C., for the Crown.

E. A. DuVernet, for the defendant.

OSLER, J.A.—The accused was indicted at the General Sessions of the Peace for the county of York, for that he did in the month of November, 1901, unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise, have for sale, a certain medicine, drug, or article, depicted, intended, or represented as a means of preventing conception, or causing abortion or miscarriage, and did thereby commit an indictable offence contrary to the Criminal Code, sec. 179 (c).

The trial took place on the 9th December, 1901, before the Chairman of the General Sessions of the Peace and a jury.

The evidence for the Crown shewed that the accused conducted a large business in various proprietary medicines, including a certain emmenagogue or medicine for stimulating and renewing the menstrual flow. This medicine was put up in the form of tablets, and sold under the terms of an agreement, duly proved, between the accused and the manufacturer. A box was produced as made up for the purpose of containing, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was pasted, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets, and a separate advertising circular referring to the tablets and describing their purposes and operation, which was also proved.

On behalf of the Crown it was contended that the statements on the box and in both the circulars referred to, or some of the same, or some expressions therein, shewed that the drug or article was thereby intended or represented as a

means of preventing conception or causing abortion; and, therefore, that the accused having offered to sell or having the article for sale or disposal, had committed an offence within the meaning of sec. 179 (c) of the Criminal Code, which enacts so, and it was urged that the case should be left to the jury to draw their own conclusions from the language of the printed notices, directions, and circulars proved.

The learned Chairman of the Sessions (Macdougall, Co.J.) was of opinion, though with some doubt, that looking at the whole advertisement, it was not one advertising a medicine for preventing conception or causing abortion, and he directed an acquittal, reserving a case for the Crown, if desired, upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned.

There was no evidence for the prosecution, except that which I have mentioned; and the question simply was, whether the advertisement was one of a medicine *intended* or *represented* as a means of preventing conception, etc. If that meaning could not be drawn from the circular, the notice, and printed directions, the case for the prosecution necessarily failed, as there was no extraneous evidence to give point to the language of the printed papers, and to shew that the medicine had been sold for the purpose said to be intended or represented. The section is new, and there is no corresponding section that I am aware of in any Imperial Act.

The defendant contends that the construction of the printed documents was wholly for the Judge. For the prosecution it is urged that it was wholly for the jury. I do not agree with either contention.

There is some analogy between a case of this kind, and an indictment for sending a threatening letter, or for a libel. In Taylor on Evidence, 9th ed., sec. 43, it is said: "The respective duties of the Judge and jury in indictments for writing threatening letters, are not very clearly defined. In some cases the jury have been permitted, upon examination of the paper, to decide for themselves whether or not it contained a menace. In other cases it appears to have been determined by the Court; while on a few occasions the opinion of the jury and the Judge have been both alternately taken." Many authorities are cited. The result of the most recent and consistent is, that the jurisdiction of the Judge is to determine whether the document is capable of bearing the meaning assigned to it, and it is then for the jury to say whether under the circumstances it has that meaning or not: per Lord Morris, C.J., in Regina v. Coady, 15 Cox C. C. 89; Regina v. Carruthers, 1 Cox C. C. 138.

not contrary to law to sell or advertise for sale the medicine in question. The Act strikes at the abuse, use of it, which may be perfectly legitimate. From the effect of its action, however, it is a drug extremely susceptible of being used for an improper purpose, or at a period which might produce a result which ought not to be sought. It cannot, therefore, be wrong to warn against its use for such purposes, or at such a period. In the absence of any other evidence, that the warning on the outside of the box was intended to be read as an invitation to do the very thing warned against, in other words, that it was not an honest warning, I have thought the learned Chairman of the Sessions was right in saying that the jury would not be justified in inferring from the warning alone that the drug was intended to be represented as a means of preventing conception or of preventing abortion. There is, however, a paragraph in the evidence "which is of a more doubtful character, viz.: 'Thousands of married ladies are using these tablets monthly. Those who have reason to suspect pregnancy are cautioned to use these tablets.'" I think the learned Chairman was right in holding that this language, read of course with the context of the printed matter, was capable of the obnoxious meaning, and that the jury could have legitimately inferred from it that the tablets were thereby represented at least as a means of preventing conception. Their object and operation are to regulate and ensuring the regularity of the menstrual flow, which is, popularly at all events, supposed to be interdependent on conception, it so clearly and explicitly stated, that it would well be asked for what other purpose married ladies, who might desire to prevent pregnancy, would be using them monthly. I think, therefore, it would have been right to have left the case to the jury; and that, if the Court had taken an unfavourable view of the meaning of the evidence referred to, a conviction might have been sup-

The expression of opinion will probably be sufficient as a guide in future cases of a similar kind, as we are not obliged, I think it would be right, even if we have the power to direct a new trial, the defendant having been actually acquitted; though, it may be, in consequence of an erroneous direction. The cases ought to be very rare in which the Court would think it right to place a second time in jeopardy for the same offence, as to what has hitherto been one of the fundamental principles of English law. I express no opinion on this point; but it is not to be overlooked, that what the section now speaks of in reference to a new trial on an appeal

by the prosecutor, is where there has been a *mistrial* in consequence of an erroneous ruling of the Judge. I must say, speaking for myself, that where there has been an acquittal it would be more desirable for the trial Judge to leave the prosecutor to apply for leave to appeal, than to reserve a case. Very different considerations, of course, prevail where there has been a conviction after an erroneous ruling on some important point adverse to the accused.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLENNAN and GARROW, JJ.A., also concurred.

APRIL 14TH, 1903.

C. A.

REX v. WOODS.

Criminal Law—Bigamy—Defence—Dissolution of Former Marriage—Decree of Foreign Court—Validity—Domicil.

Case reserved by McDougall, Judge of the County Court of York, before whom and a jury the defendant, Minnie G. Woods, was tried on the 2nd October, 1901, at the General Sessions of the Peace, upon an indictment for bigamy, and convicted. The questions reserved were as follows: 1. "Is a decree of divorce granted to either party from a marriage contracted in Canada, pronounced by a competent Court of the State of Michigan, for "extreme cruelty," a cause recognized as sufficient by the law of the said State, but a cause not recognized as a sufficient ground of divorce by the law of Canada, to be considered a valid decree of divorce in Canada? 2. In case the Court is of opinion that such a decree of divorce granted by a competent Court in the State of Michigan for the said cause is to be considered as binding and valid in Canada, was the decree of divorce granted by the Surrogate Court of Wayne County, Michigan, under the circumstances in evidence—both as to the facts and law—a valid and effectual divorce between the parties, so as to constitute in law a good defence under the Criminal Code to the indictment?"

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

T. C. Robinette, K.C., for the prisoner.

J. R. Cartwright, K.C., for the Crown.

MOSS, C.J.O.—The facts stated in the reserved case shew that, at the time of the marriage between William N. Barn-

and the defendant, both had their domicil in Canada, the marriage was celebrated in this Province.

Barnhardt had been a resident of the city of Toronto for a number of years before 1897. In the early part of that year he went to Detroit, for what purpose is not stated. He remained there apparently until the 5th July, 1897, the date of the marriage, when he came to Windsor and was married to the defendant, and remained in the Province until the following October. Up to this time there was nothing to evidence an intention to become domiciled in Michigan.

It is clear that there was no change of domicil in the interval between the marriage and the decree of divorce pronounced by the Surrogate Court of Wayne County in the State of Michigan. There was nothing more than a temporary change of residence. The marriage with Barnhardt took place on the 5th July, 1897. They continued to reside together in Canada until some time in the following September, when he went to Detroit. The defendant remained in Canada until some time in October, when she too went to Detroit, but they did not live together. Each seems to have intended to take proceedings for divorce as soon as the opportunity in Michigan was sufficient to enable them to be heard under the laws of the State. Each did take proceedings, and, after pleadings filed, the defendant's attorney withdrew her proceedings and allowed a decree of divorce to be pronounced on proof of the charges in Barnhardt's bill. The parties then seem to have returned to reside in Toronto, as it appears from the case that the defendant in November, 1900, went through the ceremony of marriage with one John Pennington. Toronto, Barnhardt being at that time alive and a resident of Toronto.

The inference from these facts is that Barnhardt's permanent home was Toronto, and that he never changed or intended to change his domicil. The nature of his residence in Detroit and his conduct generally, so far as shewn, are consistent with the existence of an intention to reside there permanently.

The Courts in England have surrendered the theory once held that no English marriage could be dissolved by a foreign Court. (See *Lolley's case* and *McCarthy v. DeCaix*, in note under *Warrender v. Warrender*, 2 Cl. & F. 567). It is now admitted that where the parties to such a marriage are bona fide domiciled in a foreign country, the tribunals of that country have jurisdiction to pronounce a divorce which will be valid: *Dicey, Conflict of Laws*, 757.

They are not bound by any principle of international law to recognize as effectual the decree of a foreign Court

divorcing spouses who at its date had their domicil in England.

In *Lemesurier v. Lemesurier*, [1895] A. C. 517, the Judicial Committee, after a full examination of the authorities, came to the conclusion that according to international law the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concurred without reservation in the views expressed by Lord Penzance in *Wilson v. Wilson*, L. R. 2 P. & D. 442, including the following, viz.: "It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

The rule thus laid down by the Judicial Committee had been recognized and acted upon by the learned Chancellor in *Magurn v. Magurn*, 3 O. R. 570, and his opinion was affirmed by this Court, 11 A. R. 178.

The foreign decree set up in this case is, therefore, not one to which credit can be given in this country as having the effect of dissolving the marriage between the defendant and William A. Barnhardt, and the defendant was rightly convicted.

That being so, and having regard to the manner and form in which the findings upon the evidence are stated and the questions are framed, we do not deem it necessary to answer the questions otherwise than as above.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

OSLER, MACLENNAN, and GARROW, JJ.A., also concurred.

APRIL 14TH, 1903.

C. A.

RE CARTWRIGHT SCHOOL TRUSTEES AND TOWNSHIP OF CARTWRIGHT.

Public School—School Site—Change of—Meeting of Ratepayers—Invalid Arbitration and Award—Mandamus.

Appeal by the township corporation from order of a Divisional Court (1 O. W. R. 387, 4 O. L. R. 272), allowing an

al from an order in Chambers and granting a mandamus to the township corporation requiring them to pass a by-law for the issue of debentures for \$1,000 for the purchase of a school site and the erection of a school house thereon.

J. B. Aylesworth, K.C., for appellants.

W. R. Riddell, K.C., and Harold Fisher, for the trustees.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLAREN, GARROW, MACLAREN, J.J.A.) was delivered by

MACLAREN, J.A.—By sec. 62 of the Public Schools Act, R.S.O. 1897 ch. 292, it is the duty of the school trustees to provide adequate school accommodation, and for such purpose to purchase or rent school sites or premises, and to build, repair, furnish, and keep in order the school-houses, etc.

By sec. 31, sub-sec. 1, the trustees have power to select a site for a new school house or to agree upon a change of site for an existing school house, but they must forthwith call a special meeting of the ratepayers to consider the site selected by them and no site is to be adopted or change of site made . . . without the consent of the majority of the ratepayers at an official meeting. By sub-sec. 2 it is provided that in the event of a difference of opinion as to the suitability of the site selected by the trustees, the difference shall be determined by arbitration. From the language it is perfectly clear that the foundation of such arbitration is a difference between the trustees, on the one hand, and a majority of the ratepayers at this special meeting, on the other, as to a school site selected by the trustees, whether such selection consists in choosing a site for a new school house where there had been no school house before—or in choosing a new and different site for an existing school house. It is, I think, also reasonably clear that a site once chosen in the manner provided by the statute remains the school site of the section, and can only be changed or abandoned in the manner pointed out by the statute.

On this site the trustees could repair, and, if necessary, under sec. 62, rebuild, the school house without calling a special meeting of the ratepayers, although under sec. 70 the consent of the ratepayers is necessary if it is proposed to incur expense for the purpose of building or re-building. No change of site was proposed in the case before us by the trustees or in the so-called arbitration proceedings. What they proposed to do was to rebuild on the old site. No special meeting of ratepayers was convened or could have lawfully been convened to consider a school site chosen by the trustees, for they had chosen none. There was, therefore, a total absence of the necessary foundation for an arbitration

between the ratepayers and the trustees, namely, a difference concerning a school site chosen by the trustees, and the whole proceedings were therefore void.

There could be no estoppel or waiver of the public right.

Sir John Robinson, C.J., in *Counties of Peterborough and Victoria v. Grand Trunk R. W. Co.*, 18 U. C. R. at p. 224, says that "the doctrine of estoppel can never interfere with the proper carrying out of the provisions of Acts of Parliament." As applied to public rights and public duties, this statement of the law could, if necessary, be fortified by numerous more modern decisions which it is not necessary to cite.

Nor is it a matter of any consequence, in my opinion, that the award is on its face valid, as stated by the learned Chief Justice of the King's Bench in refusing the order. I even doubt if the award is on its face a valid award. True, it states that it is an award under sec. 31 of the Public Schools Act, but it omits to set forth that which made it legally possible to have an arbitration under that section, namely, a difference between the trustees and the ratepayers at a public meeting called for the purpose concerning a site selected by the trustees. I am inclined to think that the award, instead of being good on its face, is at least of doubtful validity for omitting to shew such a difference.

But the matter is not, I think, of the least consequence. Whether good or bad or doubtful on its face, it was an absolutely void proceeding, unless such a difference existed, and its invalidity could have been set up by any one affected by it at any time. The facts were all easily within reach, and it was I think, the clear duty of the township council, acting judicially and without bias on either side, to have investigated the facts, when they must have found, or been advised, that the award was a mere nullity and in no sense an answer to the application of the trustees.

The appeal fails and should be dismissed with costs.

APRIL 14TH, 1903.

C. A.

REX v. JAMES.

Criminal Law—Keeping Common Gaming House—"Gain"—Payment for Refreshments—Profit—Misdirection—Acquittal of Defendant—Reserved Case—New Trial.

Crown case reserved, heard before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

J. R. Cartwright, K.C., for the Crown.

T. C. Robinette, K.C., for defendant.

OSLER, J.A.—The defendant was indicted for keeping a common gaming house contrary to secs. 196 (a) and 198 of Code. The former defines a common gaming house as a house, room, or place kept by any person for gain to which persons resort for the purpose of playing at any game of chance.

The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing poker. Out of the stakes which were bet on most, though not all, of the different hands, a sum of money was withdrawn and put to one side as a "rake-off" to cover the expenses of the cigars and refreshments consumed by the players. The frequenters left as late as 3, 4, or 5 o'clock in the morning.

The manager and proprietor only charged and received a fair price of the refreshments furnished, to the frequenters, such as would be charged in an ordinary restaurant, and the cost of the cigars sold to them; 50 to 100 of these would be consumed in the course of an evening, the profit of which would be from 2 cents to 4 cents a piece. No charge was made for the use of the room.

One Repath, an informer who had given evidence in the County Court before the police magistrate, when defendant was committed, was not present at the trial, being abroad in the United States, and his evidence was read to the jury. It was in effect that he had repeatedly been at defendant's place playing poker, 5 cents ante and 25 cents limit, with a rake-off of 5 cents on each hand, collected by or for the defendant; that this rake-off did not include refreshments, but that refreshments were served, and the amount received by defendant would more than cover the cost of the refreshments; that he knew defendant and that he had taken about 50 to 100 of these cigars as a rake-off at one sitting of the game. This was denied by the defendant.

The Crown contended that the use of the room in question as an adjunct to the cigar shop was a colourable transaction, and that the profit made out of the sale of the cigars was sufficient to constitute a keeping "for gain." The defendant on the other hand urged that the indirect advantage derived from the sale of cigars was the only benefit derived from playing of the game, and that this was in the ordinary course of his business and was no infraction of the law.

The learned junior Judge of the County Court, before whom the case was tried with a jury, told them that if the

ake-off was not more than reasonably sufficient to pay the proprietor for what he furnished in the way of cigars and refreshments, then, leaving to one side the evidence of Repath, defendant would not be liable. But, if the amount of the rake-off was so disproportionate to the value of what was actually furnished in the way of cigars and whatever was given in the way of refreshment as to be an actual substantial profit to himself, he thought defendant had broken the law, and that the refreshment business was only a device to evade the statute; and that, apart from the testimony of Repath, the evidence would not sustain a conviction.

The jury found the defendant not guilty, and at the request of the Crown the Judge reserved the following question for the Court of Appeal: "Was I right in my direction as a matter of law, or did the profit made by the defendant out of the sale of the cigars to the persons who frequented his place for the purpose of playing at games of chance, under the circumstances set forth, render him liable as keeping the place for gain?"

The place in question was a room or place kept by the defendant, and it was a place to which persons resorted for the purpose of playing games, or a game, of chance. Was it kept by him for "gain"? The Act does not define the word or limit its meaning to gain derived from the rental of the room or a share of or interest in the stakes played for.

"Gain" is "that which is acquired or comes as a benefit, profit, or advantage," and it may be derived indirectly as well as directly.

The defendant was not keeping the room or place heated and lighted until all hours of the night and morning for nothing, or for some benevolent or charitable purpose. It was, or so the jury might have found, an adjunct to his usual business of a cigar dealer. By what he allowed to be done there the profits of that business were increased more or less by the sale of the goods in which he dealt, and so he might be found to have kept it for gain, though the gain was confined to the profits on the cigars which he sold to the players. Such a place as the defendant kept is, in my opinion, one of the places the Act strikes at, and perhaps one of the most dangerous. The question of what is a keeping it for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players. The question for the jury is whether he keeps the place for gain, and they may be properly told that the increased profits of the business derived from the sale of the

defendant's goods to the persons who resort to his room for purpose of play, is some evidence of a keeping it for gain. For these reasons, I am of opinion that the direction of Judge was wrong, and that the proper direction to have been is that which I mentioned. As the matter is always for the jury, the question set out in the reserved case cannot be answered in the precise terms in which it is asked.

I repeat my dissatisfaction with the practice of reserving issues at the instance of the prosecutor after an acquittal, in this case seems to me equally to illustrate its impropriety, as the defendant has been fully tried, and the jury cannot have convicted him upon Repath's testimony alone. It is a plain case for declining to direct a new trial, even if the court have the power to do so.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLENNAN and GARROW, JJ.A., concurred.

APRIL 14TH, 1903.

C. A.

RAY v. PORT ARTHUR, DULUTH, AND WESTERN
R. W. CO.

RAY v. MIDDLETON.

Issues—Breach of Contract—Delivery of Railway Bonds—Evidence—Depositions of Party in Former Action—Admissibility—Necessity for Proof by Witness or Admission of Party.

Appeals by defendants Connmee and Middleton from the order of a Divisional Court dismissing their appeals from the report of the Master in Ordinary fixing the value of certain bonds. There were two actions, which, so far as they were concerned, were brought by plaintiff for himself in the one action and in the other as executor of E. A. Wild, to recover from Middleton and Connmee, the contractors for the building of the defendants' railway, damages for breach of contract to deliver to the plaintiff \$17,500 worth, and to E. A. Wild, \$3,000 worth, of bonds of the company, when and so long as such bonds were handed over to the contractors for work upon the road. The action was tried before Mr. Justice ERSTON, J., who gave judgment for the plaintiff against the appealing defendants, and directed a reference to ascertain what was the market value of the bonds on the day upon

which they should have been handed over. The reference was had to the Master in Ordinary, who made his report in which he found the value of the bonds to have been 27 cents on the dollar, and the amount therefore due to Ray in person to be \$4,725, and to him as executor of Wild, \$2,160. An appeal was taken by defendants Middleton and Conmee to a Divisional Court, which appeal was, together with the plaintiff's cross-appeal, dismissed. The appeal to this Court was taken upon the same grounds as that to the Divisional Court, namely, that the Master in making his computation had proceeded upon an incorrect principle by averaging the prices obtained at different sales of bonds, and this without taking into consideration the number sold at each sale, and that the answers of Conmee on his examination for discovery in an action between other parties, and on a different subject matter, had been improperly admitted to shew the value of the bonds.

The plaintiff had a cross-appeal on the ground that sufficient weight had not been given to evidence shewing that the bonds were more valuable than the Master had found.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

Wellington Francis and J. H. Moss, for the appellants.

J. R. Roaf, for plaintiff.

OSLER, J.A.—I am of opinion that the Master's finding or assessment of the value of the bonds which the principal defendants should have delivered to the plaintiff at the date mentioned in the judgment at the trial ought not to be disturbed. I see no safe ground on which we can certainly hold that their value was not, at those dates, at least that which the Master has found it to be, or that it ought to be measured or ascertained then in the light of sales made years afterwards, when, in consequence of unexpected conditions coming into existence, the property of the company whose bonds were the subject of the contract between the parties became depreciated in value and the railway a non-paying concern. I think it is not unreasonable to look at the defendant Conmee's contemporary opinion of the value of the bonds, making every allowance for too sanguine an outlook, and it is perfectly manifest that he would not have parted with them at the times I have mentioned at the rate the Master has fixed.

I have read the cases of *Peek v. Derry*, 37 Ch. D. 541, 14 App. Cas. 337, *Twycross v. Grant*, 2 C. P. D. 489, and other cases of a cognate character, but I do not understand

to lay down any rule controlling the measure of damages appropriate to the facts of the case at bar.

A question arose in the Court below which was again presented before us as to the admissibility and proof of the deposition of the defendant Conmee taken for discovery in the former action, to which he and his partner, the defendant Conmee & Co., were parties, relating to these bonds. It is elementary that if properly proved such a deposition was admissible as an admission against the deponent and his partner in the subsequent action, but I should have thought it equally elementary that, being only the shorthand writer's copy or a copy of what the defendant is supposed to have said on his deposition in another action, it could only be introduced by its own proof by a witness, or defendant's own admission, or that it was a true statement of what he had formerly sworn to.

The rules of Court which provide for taking the examination of a party or witness in shorthand and proving it by a copy certified by the shorthand writer and shorthand writer, relate, as it appears to me, to the procedure in the particular action in which the examination is taken and the manner in which the examination of the party or witness may be taken, used, and proved at the trial of or in the course or for the purposes of that

reference to Rules 456, 457, 458, 459, 461, 483, 485, 486. I think in these Rules which can be drawn into support of the contention that an examination of a party or witness in shorthand in one action may be proved in another by a copy certified by the examiner or shorthand writer.

The point, however, is not of much importance here, as the defendant Conmee was examined upon what was said to him by his depositions in the former suit, and it is proper to be inferred from what he said then that he was not going to be a statement of what he had formerly said, but that he explained or minimized the effect of it. Apart from this, however, his statements of value in former years were proposed to by the plaintiff himself, and it was for the plaintiff to attach such importance to these statements as, in the opinion of the Court, they deserved.

The Court should dismiss the appeal and cross-appeal with costs.

Chief Justice, J.A., gave reasons in writing for the same conclusion.

Justices, C.J.O., MACLENNAN and MACLAREN, J.J.A., also gave reasons in writing.

APRIL 14TH, 1903.

C.A.

RE EMPLOYERS' LIABILITY ASSURANCE CORPORATION.*Arbitration and Award—Submission—Appointment of Sole Arbitrator—Arbitration Act.*

Appeal by the corporation from order of a Divisional Court, 1 O. W. R. 87, 3 O. L. R. 93, reversing order of STREET, J., 2 O. L. R. 301.

J. H. Moss, for appellants.

G. H. Watson, K.C. and N. Sinclair, for the Excelsior Life Insurance Company.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

OSLER, J.A.—A policy of insurance issued by the Employers' Liability Assurance Corporation (hereafter called the corporation) in favour of the Excelsior Life Insurance Company (hereafter called the company), guaranteeing the company against loss which might be sustained by them through the fraud or dishonesty of one of their servants, contained, among other provisions, the following: "This agreement is entered into on the condition that, if any difference shall arise in the adjustment of a loss, the amount to be paid by the corporation shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be final."

The company, alleging that a loss had been sustained by them in consequence of the dishonesty of their servant, appointed an arbitrator on their behalf under this clause, and gave notice thereof to the corporation. Being advised that the submission was one which provided for a reference to two arbitrators, within the meaning of sec. 8 of the Arbitration Act, they further required the corporation to appoint an arbitrator on their own behalf within seven clear days following the service of such notice, failing which the company might appoint the arbitrator already named by them, to act as sole arbitrator. The corporation, contending that no difference had arisen which entitled the company to proceed to arbitration, and that, in any event, they had no power to appoint a sole arbitrator, made no appointment. The company then appointed, and gave notice to the corporation that they had appointed, the arbitrator already appointed by

as sole arbitrator. The corporation thereupon applied to the Judge in Chambers, under sec. 8, proviso, of the Arbitration Act, to set aside the appointment. The learned Judge refused to do so, and his order was affirmed on appeal by the Divisional Court. The corporation now, by leave, appeals to the Court against these orders.

It was contended by the respondent company that the reference to the Judge of Street, J., was made by him as *persona designata*, and was not subject to be reviewed by the Divisional Court, or the Court. The short answer to this objection, however, is that, by sec. 3 of the Arbitration Act, a submission, or written agreement to submit present or future differences to arbitration, has the same effect in all respects as if it had been made a rule of Court; *s.c.*, the High Court of Justice.

When, therefore, a Judge in Chambers entertains an application to set aside an appointment of a sole arbitrator on such a submission, he is not exercising a personal or independent jurisdiction, but is acting as, or for, the Court, exercising the powers of the Court, and dealing with the matter of which the Court is, by statute, already seised. He does in exercising many of the other powers which are conferred upon the Court or a Judge in reference to a submission, *e.g.* enlarging the time for making an award (sec. 10), remitting the matters back for the re-arbitration of the arbitrators (sec. 11). Under the corresponding provisions of the earlier Act, R. S. O. 1877 ch. 50, before making an application to revoke the appointment of a sole arbitrator, it was necessary in order to confer jurisdiction, to make the submission a rule of Court, which was done as a matter of course, unless it appeared therefrom that the parties had agreed to the contrary. The present case is no exception with this formal proceeding, and regards the reference as in Court *ab initio* for the purpose of any motion to set aside it: *Re Allen*, 31 U. C. R. 458; 488; and *Re Walbridge*, 13 A. R. 104, 112, may also be referred to.

What we have to deal with, therefore, is a judicial order, which is appealable under the proper conditions.

The question is, whether the submission is one providing for a reference to two arbitrators, within the meaning of sec. 3 of the Arbitration Act, which enacts that, "Where a submission provides that the reference shall be to two arbitrators to be appointed by each party, then, unless the submission expresses a contrary intention" the arbitrator appointed by one party, may, on the default of the other party, be appointed to act as sole arbitrator.

in the reference. In such a submission, a provision is implied, unless a contrary intention is expressed therein, that the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award: sched. A (b).

Those, therefore, who become parties to it, do so with the knowledge that if the arbitrators are appointed, the award will not necessarily be made by them, but may, if they do not agree, be made by an umpire; and also that if either fails to appoint his arbitrator, the award may be made by a single arbitrator.

The Legislature is dealing with the contract of the parties, and attaches to it the terms and consequences I have mentioned, unless a contrary intention is expressed. If the contract they have made is not that which the section deals with, but a different one, it cannot apply. The submission before us is, no doubt, a submission to two arbitrators. But it is something more. Clearly, the two arbitrators could not have appointed an umpire. That power, which would otherwise have been implied, is excluded by the language of the submission, which expresses a contrary intention, viz., the intention of the parties not to submit to the award of an umpire.

Equally clear, as I venture to think, is the expression of their intention that the only award by which they are to be bound is one made by two arbitrators, either the two to be appointed by them, or, if they are unable to agree, not by an umpire, but by one of the appointed arbitrators, and a third arbitrator to be chosen by the two. By the very terms of their agreement, they have excluded the operation of sec. 8 (b) of the Act, inasmuch as the appointment of a sole arbitrator is not consistent with an agreement which contemplates and provides for an award by two, or by two out of three.

It was argued very forcibly by Mr. McKay that if you stopped at the end of the first clause, there was a reference to two arbitrators simpliciter, and that one of the parties had the right to apply the statute if his opponent attempted to defeat the submission by making no appointment. But I know of no authority for thus severing what is one entire agreement. It is the right of the parties to enter into such an agreement as will exclude the statute, and when the whole of their agreement in this case is read, the "contrary intention" the Act refers to is seen, namely, that sec. 8 (b) is not to apply, and that the award is to be made, if made at all, by two arbitrators, and not by a sole arbitrator, or an umpire.

whether the third arbitrator was to be appointed after either two had failed to agree, or, as I should suppose the proper course, before they entered upon the reference, seems to be a matter of little moment. The submission may not be touched in the usual terms of a submission to three arbitrators, but neither is it what may be called the statutory submission to two arbitrators; and, unless it is, I do not see how either party has the right to appoint his arbitrator the other arbitrator.

It is asked in the judgment entered, why such a submission as we have before us is not quite as much within sec. 8 as a submission to two arbitrators with power to appoint an umpire; or to two arbitrators simply, saying nothing about an umpire. To which, with deference, I can only answer that the two agreements are entirely different, or seem to be so. In one case the parties know that they are entering into a submission under which an award may be made by an umpire; or by what may be described as a statutory tribunal consisting of a sole arbitrator—the arbitrator appointed by one of the parties. In the other, they provide, they are at liberty to do, for an award by two arbitrators, to exclude the contingencies which may arise and are provided for by the simpler form of submission. The statute, perhaps unfortunately, does not provide for an attempt by one of the parties to such a reference to defeat it by refusing to appoint an arbitrator; but, whatever remedy the disappointed party may have for breach of contract, I think he had no right to appoint a sole arbitrator, as if the Act applied to such a reference.

I agree with the opinion of my brother MacMahon in the judgment below; and with the judgment of the Chancellor in *Re Leon Falls Electric Light and Power Co.*, 2 O. L. R. 585, rather than with that of the Divisional Court; and would, therefore, allow the appeal.

APRIL 14TH, 1903.

C.A.

DAVIEAUX v. ALGOMA CENTRAL R. W. CO.

*Master and Servant—Action for Wages—Amount to be Recovered—
Variation on Appeal.*

The plaintiff sued for wages earned as a car-repairer and entered in the service of defendants during 1901, and for other services rendered in 1900 in connection with the detection of deserters from defendants' employment, and

The action was tried before FERGUSON, J., at Sault Ste. Marie, and judgment was given for plaintiff for \$227.

The defendants appealed.

• W. Nesbitt, K.C., for appellants.

J. P. Mabey, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.) was delivered by

OSLER, J.A., who reviewed the evidence and held that the amount of the judgment should be reduced to \$208.48, and, with this variation, that the appeal should be dismissed with costs.

APRIL 14TH, 1903.

C.A.

McCULLOUGH v. ALEXANDER.

Negligence — Chattel Mortgage — Race-horse — Loss of — Agency of Trainer — Unsatisfactory Verdict — New Trial.

Appeal by defendant from judgment of STREET, J., in favour of plaintiff upon the findings of the jury for the recovery of \$1,100. The action was brought for damages for the loss of a racing filly called "Montreal," of which plaintiff was the owner, and defendant the chattel mortgagee. The loss occurred, as the jury found, by reason of the negligence of one Nixon, a trainer in whose charge the filly was. The plaintiff's claim was based on Nixon's agency for defendant. The jury found the agency proved, and gave plaintiff \$1,100 damages.

A. B. Aylesworth, K.C., and R. G. Code, Ottawa, for defendant, contended that Dixon had the filly as agent for plaintiff; that under the admitted facts there was no liability upon defendant; or, at all events, that the findings were against the evidence and the Judge's charge, and the damages excessive.

G. F. Henderson, Ottawa, for plaintiff, contra.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—We have fully considered the arguments of counsel on both sides, and after a careful examination of the opinion that the verdict of the jury is so un-
it ought not to be allowed to stand. It is
at the learned trial Judge is also dissatisfied

the exercise of our discretion, therefore, we direct that no new trial shall be had between the parties, the costs of the trial and of this appeal to abide the result. It is unnecessary to make any observation upon the evidence which appears to say that too much stress appears to have been laid upon the precise time at which the conversation between the parties on the 30th September took place, if even it was on that particular day. That such a conversation did take place is clear, and it is difficult to imagine any other explanation for the defendant's telegram of that day to Nixon, commanding the order which he had given by the telegraph on the 28th to send the horse to Ottawa. We do not think anything now said to embarrass the conduct of the trial, whether it takes place before a jury or before a judge, if he should think fit to dispense with a jury.

APRIL 14TH, 1903.

C.A.

OLDEN v. TOWNSHIP OF YARMOUTH.

Repair—Injury to Person—Approach to Railway—Neglect of Railway Company to Fence—Municipal Corporation—Relieving Agent.

Action was brought against the township corporation, the Canadian Central Railway Company, and the Canadian Pacific Railway Company, but was dismissed at the trial, except, as against the Canadian Pacific Railway Com-

On the 1st November, 1901, plaintiffs, husband and wife, were travelling from the city of St. Thomas towards their home at Yarmouth Centre, along the Talbot road in a buggy, which was attached a young and spirited horse. The line of the railway was built and owned by the Canadian Pacific Railway Company, but at the time in question leased or used by the Canadian Central Railway Company, crossed the Talbot road outside the limits of St. Thomas. The crossing was not level, but the approach to the track was graded up to a necessary level of the track about four feet above the natural level or surface in that vicinity, leaving as a result a declivity at each side of that depth. No rails were laid along this declivity, and the absence of such rails was the negligence complained of as against the defendant township corporation. When plaintiffs approached the

crossing in question, a freight train, with a Michigan Central engine, stood on the track. It pulled out of the way, and plaintiffs proceeded to cross, when, just as the rails had been passed, the horse reared and turned sharply to the right, ran down the declivity, and into a private lane, and finally into an orchard, before it was stopped. The plaintiffs were thrown out and injured. The *via trita* at the place was 21 feet wide. The highway was otherwise in good repair.

The trial Judge gave judgment (1 O. W. R. 557) in favour of plaintiffs as against the township corporation and the Michigan Central Railway Company. Both defendants appealed.

The appeal of the railway company was allowed at the hearing (*ante* 130).

A. B. Aylesworth, K.C., for appellant township corporation.

W. R. Riddell, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A., was delivered by

GARROW, J.A. (after setting out the facts).—I am of the opinion that the finding, so far as the railway is concerned, can only be justified on the ground that the locus in quo is an approach to a railway crossing. . . .

The facts, historically, are rather meagre in the printed case, local knowledge on both sides having been apparently imported as matter for judicial notice rather than proved. One of the witnesses, however, speaks of the highway having been in its present condition since 1893, which was probably the date of the construction of the railway. There is no evidence that sec. 186 of the Railway Act, 51 Vict. ch. 29 (D.), was never complied with. That section requires that any approach by which any roadway is carried over or under any railway or across it at rail level shall not be greater than one foot of rise or fall for every 20 feet of the horizontal length of such approach, unless the Railway Committee direct otherwise, and a good and sufficient fence shall be made on each side of such approach . . . which fence shall be at least four feet in height from the surface of the approach. This imposes a plain statutory duty not involving any nice questions of reasonable repair, etc., such as would undoubtedly lie against the railway company at the instance of any one who had suffered injury owing to a neglect of such duty. The railway company in default in the present instance were the defendants the Canadian Pacific Railway

; and, if any of the defendants should pay, that come the one, apparently primarily liable. That liability, cannot now be made effectual, because . . . as to that company was dismissed at the trial with plaintiffs' consent.

Under these circumstances, it appears to me that sec. 611 of the Municipal Act, which was not brought to the notice of the learned Chief Justice, affords a complete defence to the defendants the corporation of the township of Yarmouth. In section it is provided that nothing contained in secs. 610 (which impose the statutory duty upon municipalities to keep their highways in repair) shall cast upon municipalities any obligation or liability for acts done or omitted to be done by other persons, companies, or corporations, acting in the exercise of the authorities conferred upon them by law, and over which municipalities have not control.

Section 611 was first introduced in the Municipal Amendment Act, 1896, 59 Vict. ch. 51, sec. 22 (O.) Before the passing of the statute it had been held, under the provisions of the statute, that a prior neglect by a municipality of its statutory duty with respect to approaches to crossings did not excuse the municipality from their statutory obligation to keep such approaches in repair: *Mead v. Township of Etobicoke*, 13 O. R. 438; *Fairbanks v. Township of Yarmouth*, 12 O. R. 273.

The injury in the latter case took place on 23rd February, 1896. The judgment of the learned Chancellor, who gave the judgment, was given on 13th February, 1896, or about two months before the final passing of the statute before referred to, which was assented to on 7th April, 1896—passed in consequence of these decisions.

It is not, I think, necessary to say more than that, in my opinion, the facts in this case very clearly fall within the exception created by sec. 611, rather than within the rule as stated in sec. 606, and that, for this reason, the defendants in this case, the corporation of the township of Yarmouth are not liable for the plaintiffs' claim, and the appeal by these defendants must therefore, be allowed, but, under the circumstances, the costs, and the action dismissed with costs.

APRIL 14TH, 1903.

C.A.

THOMPSON v. COULTER.

*Evidence—Corroboration—Action by Executors for Money Demand—
Defence of Payment in Cash to Testator—Testimony of Defendant
—Corroborating Circumstances.*

Appeal by defendant from judgment of a Divisional Court, 1 O. W. R. 205, reversing judgment of BOYD, C., who dismissed the action.

The plaintiffs were the executors of John David Thewes, and the action was brought to recover from defendant \$1,000, in connection with the purchase of certain land by defendant from deceased. The question in dispute was whether the \$1,000 had actually been paid to Thewes by defendant, as asserted by the latter. The \$1,000 had been deposited in a bank by defendant to deceased's credit, and defendant said that deceased gave him the pass-book relating to the deposit, and a cheque for the amount, and he (defendant) drew out the money and gave it to deceased.

The Divisional Court held that the onus of shewing payment was on defendant, and that he had not satisfied it by his own uncorroborated statement that he had paid it to Thewes in cash, when the latter was in a hospital.

A. B. Aylesworth, K.C., for appellant.

F. E. Hodgins, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER. MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

GARROW, J.A. (after setting out the facts).—The issue is purely one of fact, and must depend for its solution upon the credit to be attached to the defendant's testimony as given in the witness box. The learned Chancellor, who saw the witness and heard his evidence, considered him a credible witness, and dismissed the action. The Divisional Court do not treat him as not worthy of credit . . .

Assuming then . . . that defendant's account of the matter is credible and ought to be believed, the test from the standpoint of the Divisional Court is, has it been corroborated? I do not quarrel with that test, although, with deference, I think there is sufficient corroboration: *Radford v. Macdonald*, 18 A. R. at p. 171; *Green v. McLeod*, 23 A. R. 676. . . . What are the corroborating circumstances here? Thewes was a smart, shrewd old man, keeping a sharp

ut upon his money. There is not a particle of evidence e in any way trusted defendant. On the 12th May he not even put his name to the deed till the whole pur-money was either in his own hands or under his control bank. This is proved by Mr. Smith, as well as by deat. Is it probable or reasonable to presume that on th of the same month he permitted the defendant ain his bank book and a signed cheque for \$1,000, and p the proceeds without any written evidence in the way receipt, note, or otherwise? If defendant acted, as he as a mere messenger, and handed over the money at he absence of such written evidence would be probable. did act as such messenger merely, and failed to hand he proceeds, there would have been an immediate out-ne would think, and the criminal law would have been d. If, on the other hand, the transaction . . . ated to a loan or a trust, and involved defendant's keep-e money for a time, the absence of any writing is quite rdinary, under the circumstances.

appears that in July Thewes gave an order to Father ois to get this money. The order is ambiguous, but, assume that it is, as plaintiffs contend, an order to pay he money to Father Langlois. Father Langlois wrote endant to send him the money—so he says. Defend-account of the letter, which was not produced, was that ply said Thewes wanted to see defendant. And ac-gly defendant visited Thewes in the hospital, and was told by Thewes to pay no attention to Father Langlois. No further demand was made . . . in Thewes's ne. . . . The state of Thewes's mind towards r Langlois, as described by defendant, is corroborated e witness Gabau, who says that when Thewes was ill done in his house . . . witness advised Thewes to or Father Langlois, but Thewes refused, saying that if r Langlois came, he would only come on speculation ould want his (deceased's) property. This appears to e a material corroboration, and to explain the order ly, which was intended to put Father Langlois off the This is strengthened materially by the fact that if der was really intended to be acted upon, nothing was done under it, but to write the one letter, to which no was made except the visit. . . .

ppeal allowed with costs and judgment of the Chan-restored.

APRIL 14TH, 1903.

C.A.

FIRST NATCHEZ BANK v. COLEMAN.

*Company—Indorsement of Promissory Note—Transfer to Bank—
Action by Bank against Maker—Defence that Bank not Lawful
Holders—By-laws of Company—Provision as to Indorsing Notes
—Non-compliance with—Transfer of Debt Represented by Note—
Powers of Directors—Authority of Solicitor.*

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., dismissing an action on a promissory note for \$2,000 made by defendant to the order of the Vidalia Lumber and Manufacturing Company (of Vidalia, Louisiana), and indorsed to plaintiffs.

A. B. Aylesworth, K.C., for appellants.

E. L. Dickinson, Wingham, and J. L. Killoran, Seaforth, for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, JJ.A.) was delivered by

MOSS, C.J.O.—Defendant set up that plaintiffs were not the lawful holders of the note, and a special defence to the effect that the note was to be paid out of defendant's share of the profits derived from the business of the Vidalia Lumber and Manufacturing Company, and not otherwise. The trial Judge admitted, against objection, parol evidence in support of the last defence, and held it to be established. . . . The burden of sustaining the defence that he was not to pay the note unless out of profits, lay upon the defendant. The evidence in support of it appears far from satisfactory, and there are many circumstances tending to cast doubt upon defendant's contention.

But we are constrained to give effect to the defence of the bank not being the lawful holders of the note, or of the debt which it represents.

If the bank are to be held to their pleading, and the action is to be dealt with as on the promissory note merely, we think the bank failed to prove that the indorsement was signed by a person duly authorized to indorse on behalf of the lumber company, and therefore the note was not duly indorsed to the bank.

On the other hand, if we consider that we ought to treat the action as one founded on an assignment to the bank of the debt, there are insuperable difficulties in the bank's way..

The company were authorized to issue notes. . . .
 business and affairs were to be under the management
 of three directors, and all the corporate powers
 were vested in the board . . . Coleman (the defendant),
 and Sloan were constituted the board, with the
 defendant as president, Dickson as vice-president, and Sloan
 secretary and treasurer. The board were empowered to
 make rules and by-laws . . . One of the by-laws provided
 that checks, drafts, promissory notes . . . should
 be signed by the secretary-treasurer and the president. An-
 provided that all other contracts intended to bind the
 company should be executed by affixing the corporate seal,
 and countersigned by the signature of the secretary-treasurer and that
 of the president. . . .

Shares were allotted to defendant at first. . . .
 A promissory note in question was given in connection with
 the allotment of twenty additional shares to defendant. It
 is dated the 20th February, 1900, and is payable to the
 Vidalia Lumber and Manufacturing Company, Limited, or
 its order. It is indorsed: "Vidalia Lumber and Manfg. Co.,
 by Arch. S. Dickson, Vice-President and Acting
 Treasurer." . . .

Defendant was absent from the place of business of
 the company, and had been for some months, but he had not
 resigned his position, nor had his place on the board been
 vacated or filled by the appointment of another
 director. He was not asked to indorse or put his signa-
 ture on the indorsement, and there was no resolution of the
 board appointing the vice-president to indorse in his stead,
 nor of varying the two by-laws regulating such an

only warrant for Dickson's action . . . is an
 extract from the book of minutes of directors and shareholders'
 meeting, purporting to be the proceedings at a meeting of
 the board held on the 1st February, 1901. . . . Sloan and
 Dickson assumed to adopt a resolution which . . . au-
 thorized Dickson, the vice-president, the president being ab-
 sent, to sell and deliver to the bank all the property, debts
 and effects of the company, and its effects, in full settlement of the
 company's claim. . . .

A resolution, even if a valid act of the board, falls short
 of authorizing authority to Dickson to make the indorsement. It
 cannot be assumed to dispense with all the requirements of the
 law in question as to making a transfer of a note. If it
 is said to substitute the vice-president for the president,
 it does not do away with the other provisions of the by-laws
 requiring the signature of the secretary-treasurer or the seal.

But it was not a valid act of the board, and constituted no authority to Dickson to do any act of sale or delivery of property belonging to the company. . . . Assuming that the board of directors had power to sell and transfer to the bank all the company's property in settlement of the bank's claim, there is no authority for the proposition that two out of the three could do so without calling a meeting for that purpose and notifying the third. The English authorities are directly to the contrary, and so are many American decisions: *Portuguese Copper Mines Co.*, *Steele's Case*, 42 Ch. D. 160; *In re Homer Mines*, Ex p. Smith, 39 Ch. D. 546; *Deambrocker v. Columbia City Lumber Co.*, 28 Pac. R. 899; *People v. Catchellor*, 22 N. Y. 134; *Harding v. Vandewater*, 40 Cal. 77.

No case from Louisiana has been cited in support of the action of the two directors, and the two instances cited seem to turn upon their own circumstances: *Chase v. Tuttle*, 55 Coun. 455; *Edgely v. Emerson*, 3 Foster (N. H.) 555. . . .

The same objections apply if it is sought to recover upon the debt. It is true that a notarial instrument is produced by which Dickson purports, as vice-president, and under the authority of the resolution of the 1st February, to sell and transfer to the bank all the assets of the company, including the promissory note in question. This instrument is not executed as required by the by-law which calls for the affixing of the seal, attested by the signatures of the secretary-treasurer and the president. And there is no valid action of the board dispensing with these requisites.

We cannot accede to the argument that Mr. Boetner (the attorney for the company upon an application by the bank for a receiver) was duly authorized to enter into such a bargain or contract on behalf of the company by virtue of his engagement or retainer to represent it in the application for a receiver. His action in this respect was not submitted to three of the five shareholders of the company, and they were afforded no opportunity of expressing an opinion on the subject. Whatever powers the directors, or the whole body of shareholders, may have to dispose of the whole assets and terminate the business of the company, they were not exercised by them. We think the instrument in question did not transfer the debt to the bank.

We do not think these conclusions are open to the objection that this is a collateral attack on the assignment or the proceedings on which it is founded.

The bank is obliged to rely upon the instrument as establishing its right to maintain the action as assignee of

t. The defendant, therefore, has a right to insist the bank shewing an assignment validly executed so as to transfer the property, and in this the bank has

we think the dismissal of this action should not prevent any other proceeding in case the bank is able hereafter to make a valid assignment or indorsement to be made, or if an action is brought by the company. . . .
 Appeal dismissed with costs.

APRIL 14TH, 1903.

C. A.

MANN v. GRAND TRUNK R. W. CO.

Construction—Gravel—Taking and Removal—Ownership of Land—Evidence—Damages.

Appeal by defendants from judgment of FALCONBRIDGE, J., O. W. R. 230, in favour of plaintiffs in an action for conversion by defendants of a quantity of gravel on lands of plaintiffs, granting injunction restraining defendants from further interference with the deposit of gravel and awarding plaintiffs \$350 with costs.

Facts appear in the reports of the decision upon a trial, 32 O. R. 240, and in appeal, 1 O. L. R. 487.

Appeal was heard by MOSS, C.J.O., OSLER, GARROW,

OSLER, K.C., for appellants.

MOSS, for plaintiffs.

MOSS, C.J.O.— . . . The first contention is, that it is proved that the parcel or strip of land from which it is shown the defendants removed gravel is the plaintiffs'.

Both parties claim through the same grantor, William C.

The deed from him to the Buffalo and Lake Huron Railway Company, through which the defendants claim, in support of their defence, "that they acquired and became entitled of the right to take for their own purposes and the use of their railway the said gravel and rights of way to the beach or margin of Lake Erie for their purposes aforesaid." has upon it a map or plan shewing Lake Huron the southern boundary of the parcel of lot 4 in question. This instrument is in itself evidence of dealing with

and acts of ownership in connection with the property, even without the proof of the defendants having acted under it. *Doc v. Pulman*, 3 Q. B. 622.

There is a roadway north of the beach or edge of Lake Erie, running through the range of lots and following the lake shore, but the evidence is that it is a "forced" or trespass road, and not an original reservation or allowance. The plaintiffs and those through whom they claim appear to have exercised acts of ownership on the strip south of the roadway by erecting and using buildings spoken of as a blacksmith shop and an ice house. Certain maps or plans which were deposited in the registry office of the county of Haldimand were produced, which indicate that the range of lots in question go to the water's edge of Lake Erie, and there is some though not very satisfactory, evidence as to the field notes of the original surveyors shewing that they ran the lines of the lots through to the water's edge. In 1860 one of the maps or plans above spoken of was prepared by one Henry Low, P.L.S., under the instructions of and for the township of Moulton. He says he prepared it from surveys made by himself and others and from other material and information including the field notes of the original surveyors, from which he concluded that the lots ran through to the water's edge, and so indicated them in his map or plan. While this evidence may not be conclusive as against the Crown, I think it is sufficient, in the absence of anything to the contrary, to shew title in the plaintiffs as against the defendants.

The defendants' next contention is, that the deed from Benson to the Buffalo and Lake Huron Railway Company was either a grant of the strip in question in fee or a grant to take and remove gravel in perpetuity—a license of profit *à prendre*.

But I think it is nothing more than a sale and transfer of the gravel upon the lands at the time of the deed, with a right of way or access to and from the place where the gravel was situate. It does not purport to grant or convey an estate in the land or any interest save such as was necessary to enable the railway company to remove what it had purchased.

The statement in the deed that "the extent and description of the said land covered by and containing the gravel hereby conveyed" shews plainly what is conveyed, viz., gravel as distinguished from the land, and emphasizes the previous grant of "all and singular the gravel situate and being and comprised within" the parcel of land. I re-

as a present grant of the gravel in the land at the date of the deed, and of nothing more. I entirely agree with the view of the deed and of the defendants' rights under it taken by Meredith, C.J., in 32 O. R. at p. 241.

Such being the effect of the deed, I think the evidence shows that the defendants have taken large quantities of gravel which did not belong to them from the plaintiffs' premises. . . .

The last objection to the judgment is, that there was no evidence on which to base a finding of \$350 or any other sum for damages. The evidence is, that during 1897 the defendants were engaged in removing gravel from the plaintiffs' two adjoining premises at the rate of 90 to 100 carloads a day for three weeks, and that during 1898 they removed the same rate for nine weeks or longer. Each car held on an average 8 cubic yards, valued at 10 cents per yard. The exact quantities taken from each place could not be ascertained, but it is plain that a large number of car loads were taken from the plaintiffs' premises.

Upon the evidence a jury might, and I think probably would, have awarded a greater sum for the trespasses and damages done, and I think the amount fixed by the learned Judge of Justice is reasonable and well supported by the evidence.

The appeal should be dismissed with costs.

OSLER, J.A., dubitante, concurred.

GARROW, J.A., concurred.

APRIL 14TH, 1903.

C. A.

DONER v. MUTUAL RESERVE FUND LIFE ASSN.

Insurance — Validity of Policy — Transfer of Insurance from one Company to Another — Novation — Payment of Premiums — Estoppel.

Appeal by defendants from judgment of ROBERTSON, J., in W. R. 566, 583, in favour of plaintiff in an action upon policy of life insurance.

The appeal was heard by MOSS, C.J.O., MACMAHON, J., and EET, J.

C. Robinson, K.C., and R. B. Henderson, for appellants.
G. F. Shepley, K.C., for plaintiff.

Moss, C.J.O.— . . . George Spooner was a member in good standing in the Covenant Mutual Association at the date of the agreement between that company and the North-West Life Association, and as such his policy was accepted by the latter company. He assented to the arrangement and paid premiums, and so became a member of that company. Then he did not assent to Hoover's proposal to become a member of the Home Life Association, but decided, notwithstanding the arrangement said to have been effected between it and the North-West Life Association, to remain in the latter company, and he did so remain and pay premiums until the arrangement of the 1st September, 1900, between the North-West Life Association and the defendants, was consummated. That he was considered and treated as still a member and liable for premiums to the North-West Life Association is shewn by its secretary's letter to him of the 24th August, 1900, enclosing notice of premium due on the 24th September, "on your policy or certificate of membership issued by the Covenant Mutual Life Association of Illinois, and assumed by the North-West Life Association of Chicago." Not only was he retained as a member, but, as appears from the letter, the amount of premium rates on his policy or certificate was considerably increased by a resolution of the 15th May, 1900, some months after the date of the Home Life agreement. Before the premium fell due, the North-West Life Association consummated the arrangement with the defendants, and the latter company thereupon accepted Spooner as one of the members of the company, who was (in the words of the agreement) "in good standing at the date and time this contract is ratified and approved of by the members of the said company," and the defendant dealt with him as such, and he was notified by the defendants by circular letter of the 1st September, 1900, that he had been transferred to and reinsured in the defendants, and that there would be sent him in a few days official evidence of the assumption of his insurance, and that, in the meantime, his insurance was protected. He was further notified by circular letter issued by defendants, and dated the 10th September, that they had assumed every policy or certificate in good standing on the 1st September, and he was required to pay the premium to them. And on the 14th September, 1900, they accepted from him the amount of the premium payable on the 24th September, and gave him a formal receipt therefor. The receipt is expressed to be on account of premium on policy No. 108273, i.e., the number of Spooner's policy or certificate from the Covenant Mutual Life Association. From that time until the date of

th, Spooner was a member insured in the defendants' tion, upon the terms of the agreement between it and North-West Life Association. It was not necessary to further assurance of his or the plaintiff's rights, that he take any further steps except continue to pay premiums as they fall due. So far as he was concerned, no new substituted policy was needed, but the defendants were d, if they wished, to replace the Covenant Mutual Association assessment policy or certificate, by a stand-policy with a fixed premium.

e defendants, however, contend that, before the agree-between them and the North-West Life Association, was an agreement between the latter and the Home Association, which the learned trial Judge refused to in evidence, and which shewed conclusively that er's policy or certificate was never transferred by the West Life Association to the defendants.

is doubtful if the defendants are entitled to take this n. They dealt with Spooner as one who, with his or certificate, had been transferred to and accepted by and they received and accepted his premium on that g. To this they were not moved by any act or repre-on of Spooner or the plaintiff. They had not shewn ey acted under any mistake or misapprehension, and ould not, now, be permitted to take a contrary position.

hough not prepared to say that the learned Judge n rejecting the agreement with the Home Life Associ-we have examined it and do not think there is any-in it to shew that Spooner was not a member trans-to and accepted by the defendants.

was not bound to agree to or accept the arrangement e Home Life, and he refused to do so. Between the f that arrangement and the agreement with the de-ts, he had had no dealings with the Home Life. And at ter date he was still a member of the North-West Life ation, and was wholly unaffected by its agreement with ome Life. This being the case, the agreement with fendants expressly applied to him, and he accepted it as accepted by the defendants. Under these circum-s, the plaintiff is not driven to rely upon the standard issued by the defendants. But it is important to ob-hat, on the face of that policy, the defendants recog-Spooner as a member entitled under policy No. 108273, at they propose to continue him as a member upon the stated. One of the terms is that it is not to take effect he payment of the first premium in Spooner's lifetime.

and he died before the premium became payable. In every other respect, however, Spooner literally complied with the terms and conditions upon which it issued. The contention or suggestion that he made use of his membership in the Covenant Mutual Life Association to obtain another policy for the same amount from the Home Life Association, and that he agreed to deliver up the policy or certificate for cancellation, does not assist the defence. In strictness, the application to the Home Life Association does not contain an undertaking to deliver up the policy or certificate in question or any policy, though that may be implied. But, assuming that it does so, such an undertaking was no prejudice to the defendants, and in fact the policy or certificate was never delivered up or cancelled. Even if the intention in sending it to Hoover was that he might send it to be cancelled, which the evidence shews it was not, the intention was not carried out. It was recalled, and was sent to the defendants, and they now produce it.

And even if the Home Life Association has been improperly induced to issue their policy without a re-examination of Spooner, the defendants have not been prejudiced, nor has their position been altered or affected thereby.

Their liability rests upon the contract effected on the 14th September, 1900, when they accepted Spooner's premium in pursuance of their agreement with the North-West Life Association, and the circular letters sent to Spooner before that date. And that liability has not been in any way displaced by any act of Spooner or the plaintiff.

The appeal ought to be dismissed.

STREET, J., gave written reasons for the same conclusion.

MACMAHON, J., concurred.

APRIL 14TH, 1903

C. A.

RE EQUITABLE SAVINGS, LOAN, AND BUILDING ASSOCIATION.

Company — Order for Dissolution of — Ontario Winding-up Act — Application by Shareholders to Rescind — Power of Judge to Rescind—Final Order—Appeal—Ex Parte Order.

Appeal by the liquidators of the company from an order of the junior Judge of the County Court of York rescinding two orders previously made by him, under the circumstances stated below.

The appeal was heard by OSLER, MACLENNAN, and ROW, JJ.A.

A. B. Aylesworth, K.C., and A. McLean Macdonell, for plaintiffs.

F. F. Shepley, K.C., and C. D. Scott, for respondents.

OSLER, J.A.—Proceedings were taken by the directors and shareholders of this company under the Winding-up Act (Ontario, R. S. O. 1897 ch. 222, by which it was placed in voluntary liquidation with a view to its amalgamation with the transfer of its assets to another company, called the Colonial Investment and Loan Company. An agreement, authorized by special resolution passed at a special general meeting of the company, was duly executed, and the terms of the agreement had been so far carried out by the transfer of the assets of the company, and arrangement for allotment to the shareholders of shares in the Colonial company, as, in the opinion of the liquidators, to warrant an application to the Court, i.e., the County Court, for an order for the dissolution of the company, under sec. 41 of the Act. Such an application was accordingly made to the junior Judge of the County Court of York, on the 24th March, 1902, supported by the affidavit of one of the liquidators, in which all the proceedings which had been theretofore taken, including the agreement between the two companies, were set forth, and the learned Judge thereupon made an order "that the Equity Savings, Loan, and Building Association be, and the same be dissolved."

It is stated in the reasons of appeal, and was assumed or denied on the argument, that this order had been referred by the liquidators to the Provincial Secretary, as required by sec. 41, though I do not find this fact stated in any of the affidavits filed before the Judge in the subsequent proceedings now in question.

On the 7th April an order was made by the Judge, on the application of the liquidators, that no action or other proceeding should be proceeded with or commenced against the Equity Savings Loan Association, except with leave of the Court, subject to such terms as the Court might impose.

It appeared that on the 24th March, 1902, an action had been commenced and a writ served upon the liquidators of the company by one Riviere, for the purpose of setting aside the proceedings leading to a transfer of the assets of the Equity Savings Loan Association, and to restrain the liquidators from carrying out the agreement and completing the transfer.

Whether this writ had been served before the application for the order of the 24th March, does not appear. The action seems to have been afterwards settled.

On the 17th April notice of motion was given on behalf of certain other dissatisfied shareholders, of an application to be made to the Judge to set aside and vacate his orders of the 24th March and 7th April.

The application was made accordingly, and judgment reserved thereon until the 21st June, 1902, when an order was made vacating and discharging the two orders in question. In his written judgment the learned Judge says that, from the representations made to him, and the materials presented to him, on the application for the order to dissolve the company, he was satisfied that there had been a full and complete winding-up of the affairs of the company, so as to warrant the issue of the orders, but that he is now satisfied that the orders were made prematurely, and ought to be set aside.

It does not appear that any statements or representations were made by the learned Judge other than those set forth in the affidavit of the liquidators.

The liquidators now appeal from the order of the 21st June, contending that the Judge of the County Court had no jurisdiction to make it. Counsel for the dissatisfied shareholders support its validity, and attack the regularity and sufficiency of the order of the 24th March and of the earlier proceedings. They also contend that the order of the 21st June is not a final order, so as to be the subject of an appeal within the meaning of sec. 27 of the Winding-up Act.

I am of opinion that the order of the 21st June is an appealable order. Section 27, sub-sec. 1, enacts that "any party who is dissatisfied with *any* order or decision of the Court in any proceeding under the Act, may appeal therefrom," and by sub-sec. (2) no such appeal shall be entertained unless the appellant has "within 8 days from the rendering of such final order or judgment" taken proceedings on the appeal, and given security that he will duly prosecute it. If an appeal is confined by this language to final orders, restricting the wide language of sub-sec. 1, we have no definition of what is essential to that quality. The final order is not contrasted, as in sec. 52 of the County Courts Act, with orders "merely interlocutory." *McPherson v. Wilson*, 13 P. R. 339; *Baby v. Ross*, 14 P. R. 440.

In this case the learned Judge had made what appears to me to be a discretionary order under sec. 41, dissolving the company. I am inclined to think that in a case of voluntary liquidation he is not bound to make an order under that section, but may leave the liquidators to proceed under sec. 40.

may be that no appeal would lie from his refusal to such an order, though it is unnecessary to decide and not decide this. He did, however, make it, and the result was, if he had authority to do so, that the company was dissolved. Thereafter he assumed to make the order in question, rescinding and vacating his former order. He had authority to make that order, the status of the company was restored, and it appears to me that such an order is properly described as a final order, since it undid without an end to the order of dissolution which upon the face of the learned Judge seems to have thought he had no authority to make. Upon the same state of facts, or in the exercise of his discretion, he would not or might not make a similar order in the future, and on these grounds the order of the 21st June may properly, I think, be regarded as a final order and therefore appealable: *Re D. A. Jones Co.*, 19 A. R. 63; *Re Essex Centre Mfg. Co.*, 19 A. R. 125; *Re Hart Mfg. Co.*, 20 A. R. 597.

The next question, and, in my opinion, the only other question on the appeal, is whether the learned Judge had authority to make the order of the 21st June, rescinding that of the 24th March. It appears to me, upon full consideration, that he had not. The order of the 24th March was an appealable order, and any one of the shareholders might have appealed to this Court against it, on any of the grounds upon which it is now suggested that it is wrong. It is true that it was an ex parte order, and under certain circumstances a Judge who has made such an order may rescind it if it has been acted upon, as for example where it was induced by fraud or misrepresentation, or by suppression of material facts. Many of the authorities are collected in the case of *McNab v. Oppenheimer*, 11 P. R. 214, before the late Justice Rose. But in the case at bar, the facts and circumstances on which the learned County Court Judge acted as reasons for rescinding his order, were all set forth in the affidavit of the liquidator in support of the application, and the papers and documents referred to therein as exhibits. There is no reason for saying that the learned Judge was misled, or that any fact was suppressed. He took a different view of the facts from that which the law thinks he ought to have taken. He thinks the order of the 24th March was premature, and his reasons for so thinking are the facts disclosed in the affidavit which was before him. That only shews that the proper way to attack that order was by appeal, not by an application to the Judge who made it to rescind it after it had been acted upon and become effective. I am, therefore, of opinion that

the order of the 21st June, in so far as it attempts to vacate and discharge the order of the 24th March, is one which the Judge had no authority to make, and that the appeal therefrom should be allowed. As regards the order of the 7th April, if there were any authority to make it at that time, it was in its nature one which remained subject to be controlled or avoided by the Court—an order staying proceedings until further order—and therefore, *valeat quantum*, I see no objection to an order discharging or setting it aside. Whether an action will lie at the suit of the respondent shareholders, notwithstanding the order of the 24th March, it is not for us now to decide, though I may say that I am not strongly impressed with the merits of their contention. It may be that the existence of the condition on which the Judge is authorized to make it will be found of more importance than it has been said to be in the case of a dissolution under the section of the Imperial Act (1862) which corresponds with sec. 40 of our Act: Buckley on Joint Stock Companies, 7th ed., pp. 359, 360.

I think that the appeal should be allowed with costs.

GARROW, J.A., concurred.

MACLENNAN, J.A., dissented, giving reasons in writing.

APRIL 14TH, 1903.

C. A.

LEE v. CANADIAN MUTUAL LOAN AND INVESTMENT CO.

Mortgage—Building Society—Monthly Payments—Maturity of Shares—Depreciation of Assets—Deduction from Amount Credited to Shareholders—Right to Discharge—Novation—Interest—Premium—Bonus.

Appeal by plaintiff from judgment of MACMAHON, J., at trial (3 O. L. R. 191) dismissing action with costs, but allowing plaintiff to redeem on the usual terms. The action was brought to have it declared that a certain mortgage for \$1,200 made by plaintiff to the Standard Loan and Savings Co., and subsequently transferred to the defendants, was fully paid and satisfied, and for the return of the excess of payments over and above the principal and interest reserved in the mortgage. The mortgage provided for the payment monthly for 96 months of \$18.49, made up as follows: \$6.49 interest at six per cent: \$7.20 monthly subscription on shares in the company, subscribed for shortly before the execution

mortgage, and \$4.80 premium to the company for making an upon unrealized stock. Promissory notes for \$18.49 had been signed by plaintiff payable at intervals of one for 96 months, and these had been met as they e. He then tendered a discharge to the defendants, signees, who refused to execute it on the ground that ck, to the loan upon which the mortgage was col- had not been fully paid. At the time of the transfer he Standard Loan Company to the defendants, the F had withdrawn his stock from the former and trans- it to the latter. The by-laws of the latter at the time transfer provided that the premium for a loan on un- stock should be 40 cents per share per month for years or until the stock matured, whichever happened By a subsequent by-law the premium was required aid until the stock matured, no matter how long this be. As there was a depreciation in the assets of the rd Loan Company amounting to 38 per cent. thereof, was, instead of profits to add to the shares, a propor- share of the depreciation to be deducted therefrom, plaintiff found that, when he had paid his 96 promis- es, there was still between \$500 and \$600 to pay e stock.

appeal was heard by MOSS, C.J.O., OSLER and GAR- J.A.

J. Clark, for appellants.

F. Shepley, K.C., and A. McLean Macdonell, for ants.

ROW, J.A. (after setting out the facts).—The de- s' real contention is, that the shares for which the f subscribed have not yet matured; that the profits l have not been realized; that, indeed, instead of the Standard Loan and Savings Company made a large d that, although the plaintiff has already paid the \$1,775.04, he must continue to pay until he pays more to enable the shares to mature; and they rely by-laws, which undoubtedly, as do those of the Stand- n and Savings Company, provide that shares such as a question shall mature when they reach \$100 by the payments and profits. To this contention Mac- J., who tried the case without a jury, acceded. In ment the learned Judge apparently relies upon the Williams v. Dominion Permanent Loan Co., 1 O. L.

But that case is, I think, unlike this in at least one feature, viz., that there the agreement set forth in

the mortgage was to repay in monthly payments according to the by-laws and rules of the association; the provision for payment was in monthly payments according to the tenor of the rules and by-laws, until the shares shall have matured, and the proviso for reconveyance is on repayment according to the rules and the provisions of the mortgage being complied with. In the present case the payments to be made are exactly specified. There are to be ninety-six monthly payments of \$18.49 each, and the proviso for reconveyance "provided this mortgage is to be void upon the performance by said member of his hereinbefore recited agreement and upon payment of taxes and performance of statutory labour, and of the covenants and provisoes hereinafter contained." The "hereinbefore recited agreement" has been before set forth, and need not be repeated. The covenant of payment is that he will duly and punctually from time to time make the several payments as aforesaid, according to the above proviso; and also that he will observe and perform the laws and rules for the time being of the said association with respect to "the said shares and of the repayment of the said advance, and will pay all fines and forfeitures imposed on him under said rules and by-laws." It must not be forgotten that there is here no question between the members and creditors. The questions are wholly as between investing and borrowing members inter se. Nor must it be forgotten that this application which the Standard Loan and Savings Company accepted was for a loan to be repaid in eight years. The rules of that company then in force provided that loans should be made at six per cent., and should be repayable in monthly payments extending over eight years, with the option of repayment in two years, in which latter event interest only for the time the money was kept would be charged. These rules are to be treated as if incorporated in the mortgage, and read as part of it. And they must be so read and construed as to give the proper effect, not only to them, but to the other rules before quoted, which require payments upon ordinary stock to be made until with profits such stock matures. The plaintiff is a borrower, not an investor. He was to pay, not to receive, and he was to pay until he had repaid the loan and interest. It is true he is called, and for many purposes is, a member, and, as such, is subject to the rules from time to time applicable to his case. But it is clear that both these classes of rules are not applicable to him. He must, as a borrower, under an explicit rule, repay the loan and interest in eight years. The mortgage explicitly calls for ninety-six monthly payments, which he has duly made. Prima facie one would

that should be an end of the matter; that, having made stipulated payments, he is entitled to his discharge, and conveyance of his land, which he only agreed to place in mortgage for the eight years, and not for sixteen, or, it may be, for twenty years, if losses instead of profits are continuously made.

In my opinion, the proper way to apply both classes of provisions is to read those which provide for payment until maturity as applicable to the investing member only, unless the borrowing member by his mortgage expressly agrees, as in the Williams case, to repay until the shares mature. To require such an agreement here, however, is, I think, to contradict the express terms of the contract, which was, in effect, an agreement for a loan for eight years only, with the option to pay off at any time after two years, by paying the principal and interest at the stipulated rate, for the time the money was kept.

The distinction between a borrowing member and an investing member, where there was, as here, no question of the rights of creditors, was pointed out very clearly in *Brownlie v. Cassell*, 8 App. Cas. 235, and in *Tosh v. North British Finance Society*, 11 App. Cas. 439. . . .

Each payment a borrower makes is pro tanto a discharge of his liability, and cannot be recalled, nor losses charged up against him, unless under proper by-laws duly passed and applicable equally to all members. He is so far a member during the period he has agreed to occupy the position of a shareholder or mortgagee-member, he is bound by the rules of the association in force when he joined or became a member, and is even subject to new rules properly and validly made, so long as they are intra vires and do not alter his contract: *Bradbury v. Wild*, [1893] 1 Ch. 377 at p. 385. In that case it was held that a new rule to levy an assessment for losses was not an alteration of the advanced member's contract. Each case must, of course, depend upon its particular facts. The contract there was in terms much like the contract in *Williams v. Dominion Permanent Building Co.*, before cited, than the one in question in this case. Even if the contract here would justify the application of the same principle, the circumstances are entirely different. It would, to begin with, be a very distinct alteration of the contract to tie up the plaintiff's lands for a longer period than eight years. What he must pay, he is to pay within the stipulated years, and then be free. It may be that during that time, that is, during the currency of the mortgage, he is, in character of member, liable, under a properly passed

rule, to have his burden as mortgagor increased by increased assessments, but no such rule is in evidence.

The plaintiff, undoubtedly, as the learned Judge finds, thought he was getting a loan for eight years at six per cent. As a matter of fact he was, on the terms of the mortgage as it stands, paying, and has paid, between ten and eleven per cent., and if he had paid, or was to be made to pay, what the defendants demanded in addition, the rate would have been increased to something like eighteen per cent. There is in such facts a suggestion of extortion, which one would think ought to be made impossible by the Legislature, because this is, I am afraid, by no means an isolated case. The two classes, the borrowers and the investors, should, I think, be classified; their respective rights and obligations more clearly declared; and in the case of borrowers on mortgage, the maximum obligation should be declared in plain language in the mortgage itself, instead of having to be spelled out of a series of complicated and repeatedly amended rules, as in the present instance.

Fortunately for the present plaintiff, he is entitled to be relieved from further payments by the construction, and for the reasons which I have pointed out, which, in my opinion, distinguish this case from the case of *Williams v. Dominion Permanent Loan Co.*

The appeal should be allowed with costs, and the defendants ordered to execute to the plaintiff a proper reconveyance of his land in the mortgage mentioned, and a release of the mortgage; and they must pay the costs of the action.

The defendants should also refund to the plaintiff the admitted over-payment of forty-nine cents on each of the ninety-six payments, or in all \$47.04, for which amount the plaintiff is entitled to judgment, and for which he has already, in effect, a judgment not appealed against, inasmuch as *MACMAHON, J.* in the notes of his judgment, directed that this sum should be allowed to the plaintiff on taking the accounts; although the formal judgment, as drawn up, does not, as I think it should, refer to or contain this declaration.

OSLER, J.A., gave reasons in writing for the same conclusion.

Moss, C.J.O., concurred.

APRIL 14TH, 1903.

C.A.

CANADIAN PACIFIC R. W. CO. AND CITY OF
TORONTO.*Landlord and Tenant—Agreement for Lease—Covenants—Taxes—
Local Improvement Rates—Re-entry—Rent—Interest—Exemption.*

Appeal by the railway company from order of BOYD, C.,
O. W. R. 385, 4 O. L. R. 134, made on appeal from report
Mr. J. S. Cartwright, an official referee, upon a reference
to him to settle the terms of a lease of lands by the city
corporation to the company.

The appeal was heard by MOSS, C.J.O., OSLER, MAC-
LENNAN, GARROW, MACLAREN, JJ.A.

E. D. Armour, K.C., and Angus MacMurchy, for the
appellants.

C. Robinson, K.C., and J. S. Fullerton, K.C., for the city
corporation.

Moss, C.J.O.—The company complain of the learned
Chancellor's holding in affirmance of the referee's report,
that a covenant on the part of the lessees to pay taxes and
power of re-entry by the lessors in default of payment of
rent were properly inserted in the lease, and that rent should
be payable from the 1st January, 1895.

The city complain that the learned Chancellor errone-
ously decided that interest was not payable on the overdue
payments of the rent reserved by the lease.

Dealing with these in their order, the chief and most im-
portant question is that raised by the objection that the lease
should not contain a covenant to pay taxes. There are two
instruments of agreement between the parties, the first dated
26th July, 1892, and the other dated 4th February, 1895,
and it is under them that the questions arise.

In brief, their effect is stated by my brother MacLennan
7 A. R. at p. 59, as follows: "There is a contract for a
lease, renewable in perpetuity in successive terms of fifty
years, at an agreed rent, payable on named days; and the
instrument is silent as to what, if any, covenants on the part
of the lessors or lessees are to be inserted therein."

It was argued for the company that the agreement was
contained, and that there was no occasion or necessity for
any further instrument or lease, in order to give effect to the
contract between the parties.

It seems manifest, however, not only from the terms of
the agreement itself, but from the conduct of the parties, that

a formal instrument of lease was contemplated. In paragraph 19 of the first agreement, provision is made for apportionment of the first quarter's rent, "having regard to the time of possession under said lease:" and in par. 20, "the execution of such lease" is spoken of. In par. 3 of the second agreement, it is provided that the alternative site is to include "and in the lease thereof shall be described," etc. The proceedings now under review were taken under an order of the High Court, obtained at the instance of the company, whereby it was referred to the referee to determine, amongst other things, "all matters as to the time of delivery of the abstract, the sufficiency thereof, and all subsequent questions arising out of, or connected with, the title to the said site, and the carrying out of the said agreements respecting the making of title to, and the conveying of, the said alternative site." And in proceeding under this order of reference, both parties brought in and submitted to the referee draft leases of the premises.

One can hardly suppose that in dealing with such a large and valuable tract of land in the city of Toronto, and proposing to lease it practically for all time in successive terms of fifty years each at an increasing rental, the parties intended that all questions respecting their rights and obligations should rest solely upon the bald provisions of the agreement. There is nothing in the agreement from which it can fairly be inferred that the parties when they negotiated the lease did not contemplate anything, or agree to anything, that was not written in the agreement. It was eminently proper that a more formal instrument setting forth particularly and precisely the terms of the letting and holding, and the rights and obligations of the parties in respect thereof, should be prepared and executed. And in many respects the parties are now at one as to what that instrument should contain; and, except in respect of the matters now in question in this appeal, they accept the lease settled by the referee as a proper instrument.

There was much discussion of whether, in settling the terms of the lease, and especially in regard to the covenant as to payment of taxes, the referee should have received, or, at all events, acted upon, the parol evidence adduced. The referee was obliged to determine what the lease should contain, and the agreement being silent except as to the term and the amount of rent to be paid, it was necessary for him to ascertain in some way what other provisions, terms, and conditions should be inserted in it. In Woodfall's *Landlord and Tenant*, 17th ed., p. 135, it is said that the question what are usual covenants, appears to be one of fact in a case where

parties stipulate for usual covenants; but to be a question of law, where the contract for the lease is silent as to covenants. But it would appear that, whether the contract is silent or not as to covenants, there are certain covenants which, *prima facie*, go into the lease as usual covenants. But these may be subject to variation, having regard to all circumstances. In *Hampshire v. Wickens*, 7 Ch. D. 1, Jessel, M.R., refers with approval to the statement in *Dixon's Precedents in Conveyancing*, that "the result of the authorities appears to be that in a case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing "usual covenants," or, which is the same thing, in an open agreement without any reference to the covenants, and there are special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon." The learned author then specifies certain covenants, and amongst those by the lessee to pay rent, and to pay taxes, except such as are expressly payable by the land-

It is insisted that in this Province taxes are, by virtue of sec. 26 of the Assessment Act, payable by the landlord, in the absence of agreement to the contrary; and that the agreement, where being silent, the covenant to pay taxes is improper. The covenants which are usual and proper depend very much on the nature of the property. Here the parties do not occupy the position of ordinary landlord and tenant. The municipality is not an owner within sec. 26, from whom taxes can also be recovered. The lands leased, being the lands of the municipality, do not come within the general rule of liability to taxation against the owner to which sec. 26 makes no exception. They are governed by the exemption clause, sub-section (y) of sec. 7. Therefore, while occupied for the purposes of the city, or unoccupied, they are not liable for taxes under the Assessment Act; nor can taxes be recovered from the municipality in respect thereof. But, upon their becoming occupied by a tenant or lessee, they cease to be exempt. They then become the property liable to the taxes imposed by the city, and are paid to the city as part of the income which it is entitled to provide by taxation of property within its limits. The reason why the law declares that in the case of lands—the property of a municipality—the owners are not liable for taxes upon them while occupied or used by such owners, is that when used or occupied by a tenant or lessee they fall into the category of property liable to taxation, is very evident. It would be useless for the municipality to tax such property for revenue purposes. But when the lands become oc-

cupied by a tenant or lessee, the municipality becomes entitled to treat it as his property for revenue purposes, and to tax it in his hands. For the purposes of taxation, it is his property, and if it is not to be classed as land, real property, or real estate, under sec. 1 (9) of the Assessment Act, why may it not be classed as personal estate, or personal property, under sec. 1 (10)? That sub-section is made to include "all other property except land and real estate and real property" as defined in sec. 1 (9). The definition in sec. 1 (9) does not include leasehold interests, and so they fall within the term "all other property" in sec. 1 (10). Applying, then, the rule approved of by Jessel, M.R., the agreement carries in itself the *prima facie* right to the covenant in the form settled by the referee.

The parties must be taken to have dealt with knowledge of the position of the property in this respect, and, in the absence of anything to the contrary, must be deemed to have contracted with reference to that condition of affairs. Unless displaced by evidence, the presumption would be that the company understood, as any person dealing with the city for a lease of lands would understand, that to become a tenant or lessee of the city involved liability to pay city taxes in respect of the leasehold premises. As the learned Chancellor points out, the incidence of such taxation plainly falls upon the tenant or lessee, and not upon the city. And, in order to bring about this result and to entitle the city to a covenant by the tenant or lessee to that effect, it is not necessary that it should have been expressly so agreed. Unless by the terms of the agreement or the special circumstances of the case it is made to appear that the tenant or lessee was not to pay taxes, the liability of the tenant or lessee arises from the assumption of that relation in respect of lands, the property of the city. Whether the question is to be determined as one of law or as depending upon evidence, there is no difficulty in reaching the conclusion that a covenant to pay taxes is a usual covenant in a lease of lands forming part of the municipal property. Therefore, in settling the lease in question, the city is entitled to have a covenant to that effect inserted, unless it is made to appear that, by reason of the circumstances or of the terms of the agreement, the company are relieved from the ordinary obligation of a tenant or lessee of city property to pay the taxes imposed upon it.

From the nature of this case, it is obvious that cases where taxes are chargeable against, and recoverable from, the owner, furnish no analogy. The question of whether the covenant to pay taxes is a usual one for insertion in a lease of the kind in question here, must be determined by other

rations. It is shewn that, by the invariable practice of the city, all leases of its lands for long or renewal terms, contained a covenant on the part of the lessee to pay taxes. A greater portion of the lands forming what is termed the alternative site, were lands belonging to the city, held under long or long renewable terms. The company had acquired, and was endeavouring to acquire, the lessees' interests, when an agreement was made by which the alternative site was substituted. These leases were produced, and they shew that under them the lessees paid rent and taxes. The company, in acquiring the terms, became liable to the same expenses. It cannot be assumed that in the exchange effected, any other city lands were substituted, the latter were freed in the lessees' hands from a burden which they were subject to in their hands. There is nothing in the evidence to lead to the conclusion that any such agreement was come to. . . .

I think, therefore, that a covenant to pay taxes was properly inserted in the lease, and that it should stand as indicated in the judgment of the learned Chancellor.

The proviso for re-entry on non-payment of rent is so common and usual in leases, that it ought not to be excluded on any instance upon the mere suggestion that difficulty may be experienced in enforcing it. At present I am not convinced that section 3 of the Railway Act applies to the circumstances of this case; and it is not unimportant to note that, up to a late stage of the proceedings, counsel for the company entertained the view that the covenant for re-entry was proper, so far as non-payment of rent is concerned.

On the argument, much was made of the fact that the rule had been confirmed by statutes. But the rules of construction were not thereby affected. No doubt, after legislation the Court would not interfere to set aside or annul the instruments on grounds of fraud, surprise, or oppression, but they remain to be construed according to their true meaning, and the rules applicable thereto, as if there was no such legislation.

As to the date from which rent should be payable, I see no reason for disturbing the conclusion arrived at by the learned Chancellor. In 1893 the company went into possession, and from a period anterior to January, 1895, have been continuously in possession of the alternative site, with goods and freight sheds, and have been using it for all purposes without let or hindrance from the city. And it has been shewn for the company that the occupation was not a mere official as that for which they were to pay rent. The original agreement provided for apportionment of the first year's rent, having regard to the time of possession under

the lease, and properly so, for at the date of that instrument the company were not in possession. But at the date of the second instrument (4th February, 1895) the company were in possession, and the agreement fixed the date of the commencement of the first term as of January, 1895. Thus all uncertainty as to the time from which rent should be payable was removed.

I think, therefore, that the appeal of the company fails, and that it should be dismissed.

But I am unable to agree with the learned Chancellor that interest was not payable in respect of the arrears of rent. The gales of rent were payable by virtue of a written instrument, at a certain time, and so fall within secs. 113 and 114 of the Judicature Act. The reasons urged against the application of these provisions, i.e., delay in perfecting the title and completion of the transaction, however forcible in the absence of possession and beneficial enjoyment by the company, ought not to prevail in face of that fact. In *Marsh v. Jones*, 40 Ch. D. 563, the Court of Appeal held the plaintiff entitled by way of damages to interest on purchase money from the day on which the purchaser had taken possession, although the amount of purchase money was not finally ascertained for more than two years after possession taken.

I am of opinion that the referee's finding in respect of interest should not have been disturbed.

The result is that the appeal of the company is dismissed, and the appeal of the city allowed. Costs will follow the event.

MACLENNAN and GARROW, J.J.A., gave written reasons for the same conclusions.

OSLER and MACLAREN, J.J.A., also concurred.

MACMAHON, J.

APRIL 16TH, 1903.

TRIAL.

TRAPLIN v. CANADIAN WOOLLEN MILLS (LIMITED).

Master and Servant—Injury to Servant—Dilapidated Condition of Elevator—Common Law Liability—Finding of Jury.

Action for damages for injuries sustained by plaintiff while working in defendants' factory.

H. Guthrie, K.C., for plaintiff.

G. F. Shepley, K.C., for defendants.

MACMAHON, J.—One Baker, a machinist who for more than a year had been intrusted with the repair of a portion of the mill machinery, found the machinery which ran the elevator "chattering," which, he said, indicated that the ma-

ry was wearing out. About a year prior to plaintiff injured, he informed Morrison, the then manager, that an elevator was required because of the worn out condition of the machinery. Baker afterwards told Berry, who succeeded Morrison in the management, that because of the poor condition of the pinion gear and driving gear connected with the elevator machinery, they should be renewed. The elevator was 21 years old, and the life of such an elevator is about 10 or 12 years. Baker said he considered the "entering" caused the key to come out, and the key coming out caused the fall of the elevator.

The 6th question submitted to the jury was: "What, in your opinion, caused the falling of the key?" Answer: "Violence and general dilapidation of the running gear." In this answer I think plaintiff is entitled to recover at common law.

Judgment for plaintiff for \$3,150 and costs.

APRIL 17TH, 1903.

DIVISIONAL COURT.

SUMMERS v. COUNTY OF YORK.

Non-repair—Injury to Person—Liability of County Corporation—Claim over against Railway Company—Proximate Cause of Injury—Moving Car—Agreement between Corporation and Company.

Appeal by defendants from judgment of County Court of York in favour of the Metropolitan Railway Company, third parties, upon an issue between defendants and third parties. Plaintiff recovered judgment against defendants for \$160 damages sustained by reason of his horses falling over an embankment upon a road of defendants, and the judgment affirmed by a Divisional Court (1 O. W. R. 137).

The issue between defendants and third parties was afterwards tried in the County Court and decided in favour of the

The appeal was heard by FALCONBRIDGE, C.J., STREET, and RITTON, J.

C. Robinson, for appellants.

H. Moss, for third parties.

STREET, J.—The facts as found in the Court below are

The plaintiff was driving along the road in question, at a point where there is a steep embankment, eight feet high. His horses became restive by reason of the approach of an electric car of third parties, whose tracks are beside the travelled parts of the highway. Plaintiff got off his horse and stood at his horses' heads and had them under

control until after the car had passed, but they became again frightened at the noise made by the car as it passed over a wooden bridge behind where they were, and they drew plaintiff over to the edge of the embankment, and fell over it. The car was going at a reasonable speed. The railway company were not negligent in not stopping the car when plaintiff's horses were seen to be restive, because plaintiff had them under control at the time the car passed. The cause of the accident was the negligence of defendants in not having a guard rail at the top of the embankment at this point.

These findings of fact are fully justified by the evidence. . . . Apart from an agreement between the third parties and the county, the former cannot be held liable; they were lawfully using the highway for the purposes for which they are incorporated under 60 Vict. ch. 92, and they have been found not to have been guilty of any negligence in so using it.

The 3rd clause of the agreement between the parties is to be found in the schedule to that Act, as follows: "The company shall be liable to the county for, and shall indemnify the county against, all damages arising out of the construction or operation of the company's railway . . . whether such damages are occasioned while running at a speed authorized by this agreement or otherwise, and for and against the county's cost and expenses of and incident to claims for such damages."

The clause must receive a reasonable construction, and should not be so read as to make the company responsible to the county for damage occasioned not by any fault or act of theirs, but by the negligence of the county itself . . . The language must be taken to have relation to the immediate cause of the accident, which was here the absence of the guard rail, and not to its remote cause, which was the moving car.

BRITTON, J., gave written reasons for the same conclusion.

FALCONBRIDGE, C.J., concurred.

Appeal dismissed with costs.

APRIL 17TH, 1903.

DIVISIONAL COURT.

McINNES v. TOWNSHIP OF EGREMONT.

Way—Non-repair—Injury to Person—Liability of Municipal Corporation—Bridge without Railing—Notice of Accident—Requirements of—Mistake in Date—Quantum of Damages.

Appeal by defendants from judgment of County Court of Grey in favour of plaintiff in action to recover damages for

s sustained by plaintiff owing to negligence of defendants in not keeping in proper repair and in not protecting a railing a bridge upon a road under their jurisdiction, upon whereof plaintiff with his horse and carriage drove the edge into the water below.

26th May, 1902, plaintiff gave notice to defendants that he had met with an accident on 7th May (instead of 6th which was the true date) at the bridge in question, as he described, stating that it was during a thunderstorm and that a flash of lightning had caused his horse to be thrown into the water; and that "owing to the defective state of the bridge" he had lost his horse, with the aid of Mr. Andrew Peckover, and the accident could not have happened had the bridge not been defective by being void of a proper railing.

The action was tried without a jury, and judgment given for plaintiff for \$200.

The appeal was heard by STREET and BRITTON, JJ.

H. Kingston, K.C., for defendants.

G. MacKay, K.C., for plaintiff.

STREET, J.—The cause of the accident, as a matter of fact, was the negligence of defendants in not protecting the bridge with a railing to prevent accidents of this kind. It is true that this particular accident would probably not have happened had not the night been dark and the lightning vivid at the moment the plaintiff's horse was on the bridge; but these are ordinary dangers to be provided for; and if defendants had done their duty in protecting the sides of the bridge, the accident would have been avoided; and, therefore, they are liable.

The notice of accident given by plaintiff is sufficient to comply with the requirements of sub-sec. 3 of sec. 606 of the Municipal Act, when the object of requiring that notice is to bring into consideration. . . . The notice should state the time and place of the accident with reasonable particularity so as to identify the occasion, and so long as no mistake was made in either of these matters of a nature calculated to deceive or mislead the corporation to its prejudice, the notice will not be vitiated: see *Green v. Hutt*, 51 L. J. Q. B. 513; *Langford v. Kirkpatrick*, 2 A. R. 513.

In the present case the place was clearly described, and the accident was identified by the circumstance of a thunderstorm having taken place and of plaintiff having obtained the assistance of Mr. Peckover. Moreover, there is no suggestion that the mistake in date misled defendants.

Plaintiff was an elderly man, and was suddenly thrown into cold water, and was obliged to remain for some

hours in his wet clothes. He says he has suffered from the shock, and from rheumatism. I do not think we can interfere as to the amount of damages (\$200).

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

APRIL 18TH, 1903.

DIVISIONAL COURT.

BERRY v. DAYS.

Covenant — Restraint of Trade — Breach — Injunction — Damages — Waiver — Assignment of Covenant.

Appeal by defendant from judgment of MACMAHON, J. (1 O. W. R. 809), in favour of plaintiffs in action to recover damages for breach of a covenant by defendant not to enter into business as a druggist, and not to open a third or further drug-store in the village of Lucknow, and for an injunction. The trial Judge granted an injunction and directed a reference to assess damages. Defendant was selling out to plaintiff Berry one of the only two drug-stores in Lucknow; it was considered necessary that he should not for five years either open a new drug-store, or go into business with the other existing one. After five years he might go into business with the other existing one, or buy it out, but he must not for a further period of five years open a new one, so as to increase the competition in Lucknow. There were, therefore, for the first five years two concurrent covenants, one of which continued beyond the five years for a further period of five years.

J. A. Paterson, K.C., for defendant.

W. Proudfoot, K.C., for plaintiffs.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), held that the assent of plaintiff Berry to defendant's carrying on the original business with Berry's son during the first five years did not affect the covenant not to open a third business in Lucknow. The covenant is separable into two parts, and one part may survive the other. A covenant such as this is assignable, and the right to enforce it does not terminate by reason of plaintiff having gone out of business himself: *Hitchcock v. Coker*, 6 C. B. 438; *Elves v. Crofts*, 10 C. B. 241; *Jacoby v. Whitmore*, 49 L. T. 335. Judgment to stand, and defendant to be restrained from opening, carrying on, or having part in a further business in Lucknow during the period of ten years from 21st September, 1900. No reference as to damages. Defendant to pay costs of action and appeal.

THE TORONTO WEEKLY REPORTER.

(TO AND INCLUDING APRIL 25TH, 1903.)

II. TORONTO, APRIL 30, 1903. No. 16.
JUNSON, J. APRIL 17TH, 1903.

CHAMBERS.

RE GIROUX.

Application for Costs—Application for Custody of Infant—Applicant of Jurisdiction—"Proceeding"—Affidavit on which Habeas Corpus Granted.

Motion by William J. Giroux, father of Helen Mary Knox, an infant, for an order setting aside an order for costs granted on præcipe under Rule 1199. An application for the issue of a writ of habeas corpus had been obtained ex parte, upon an affidavit which shewed that the applicant William J. Giroux lived in Chicago. Nothing appeared upon the order for the writ, nor on the writ itself, to show that the applicant lived out of the jurisdiction.

E. Knox, for the father, contended that the affidavit was not the proceeding by which the matter was commenced, and that Rule 1199 did not apply.

E. Jones, for Nellie Marsden, the custodian of the infant, contended that it appears by Rule 318 and other Rules that an affidavit is a proceeding, and by the definition of "proceeding" in sec. 2 of the Judicature Act, Rule 1199 applies to habeas corpus proceedings.

ERGUSON, J., dismissed the motion and confirmed the order made on præcipe.

WRIGHT, MASTER. APRIL 21ST, 1903.
CHAMBERS.

STARBUN CO. v. STANDARD CHEMICAL CO.

Statement of Claim—Facts within Knowledge of Defendants—Evidence in Previous Arbitration.

Motion by defendants for particulars of statement of

Bicknell, K.C., for defendants.

D. Armour, K.C., for plaintiffs.

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THE MASTER.—If I rightly understand the facts, this is an action which has already been practically tried out, or at least thoroughly investigated, in an arbitration which became abortive through the death of one of the arbitrators before the making of an award, but after all the evidence had been given and argument heard. The general principle, as is well known, is, that particulars are ordered to prevent the parties from being taken by surprise and to save unnecessary expense (see *Holmested & Langton*, p. 482). I have read Mr. Webster's affidavit on which the demand for particulars is based. If the particulars therein set out as necessary were given, the whole frame work of the plaintiff's case would have to be set out, leaving nothing to be done at the trial but to fill in the details by the evidence. According to the affidavit of Mr. Rathbun, the president of the plaintiff company, this action in its present form is simply a second trial.

The only new matter now brought forward by the plaintiffs is in respect to the wrongful use of steam by the defendants. Such particulars as are possible are given in par. 4 of Mr. Rathbun's affidavit. Mr. Armour agreed to amend the statement of claim accordingly, if defendants really insist on it.

The motion, in my opinion, should be dismissed. The costs will be to the plaintiffs in the cause.

CARTWRIGHT, MASTER.

APRIL 21ST, 1903.

CHAMBERS.

DENISON v. TAYLOR.

Discovery — Production of Documents — Breach of Contract — Correspondence Relating to Similar Contracts.

Motion by plaintiff for a better affidavit in production from defendants.

Shirley Denison, for plaintiff.

W. H. Blake, K.C., for defendants.

THE MASTER.—The action is for "damages for misrepresentation, breach of contract, and breach of warranty," arising out of a purchase by plaintiff from defendants of a vault door known as No. 67 for \$250.

Examination for discovery has been had by plaintiff, at which defendants produced all the information to which, in my opinion, plaintiff was entitled, or by which he could be in any way assisted.

the plaintiff cannot hope to recover otherwise than as he himself claimed in his pleading. If there was any representation, breach of contract, and breach of warranty it can be evidenced only by what passed between the parties or by what is set out in the catalogues. Those, as I stand, defendants have produced. . . . The only thing defendants have not done is to comply with the demand to produce "any correspondence or other documents in their possession shewing the manner in which they usually describe vault door No. 67, and shewing whether they are giving to others they describe it as a burglar-proof vault or not." . . . Such evidence would be wholly irrelevant. . . .

Ferguson v. Provincial Provident Institution, 15 P. R. 241, considered and distinguished.]

The motion must be dismissed with costs to defendants in default of appearance. The plaintiff must first prove his own contract, and then the breach or breaches on which he grounds his cause of action. What other contracts may have been made with other customers, and what representations may have been made by defendants in the negotiations leading up to the contract have not, in my judgment, the slightest bearing on the question at issue between the parties.

WRIGHT, MASTER.

APRIL 21ST, 1903.

CHAMBERS.

CANADA BISCUIT CO. v. SPITTAL.

Statement of Defence—Application to Strike out Paragraph 3 of the Defence in Bar—Prosecution for Criminal Offence.

Application by plaintiffs to strike out paragraph 3 of the statement of defence of defendant Smith. The action was brought against defendant Spittal and his sureties to recover moneys alleged to have been received by Spittal for plaintiffs when he acted as their agent.

The paragraph complained of was as follows: "The defendant further says that plaintiffs laid a charge of theft against him to the extent of \$442 in or about the month of December, 1902, in respect of the matters alleged in the statement of defence; that the said Spittal was tried; and that the said charge was dismissed by a court of competent jurisdiction."

M. Denovan, for plaintiffs.

E. Hoskin, for defendant Smith.

THE MASTER.—Mr. Hoskin was not able to refer me to any authority for such a plea. He invoked the assistance of

the usual authorities on these motions, *Stratford Gas Co. v. Gordon*, 14 P. R. 407, and *Glass v. Grant*, 12 P. R. 480. . .

Now, I consider myself bound to exercise my judgment in such a case as the present; and, doing so, I cannot see any way in which the fact of the acquittal would constitute any defence to the action, nor can I truthfully say that there is either obscurity or difficulty on this point. If there was a section of the Criminal Code directly applicable, it is doubtful whether it would not be ultra vires as an interference on the part of the Federal Parliament with property and civil rights. But that may be left for consideration when any such Act has been passed.

The motion will be granted. Costs to plaintiffs in any event.

CARTWRIGHT, MASTER.

APRIL 21ST, 1903.

CHAMBERS.

PREET v. MALANEY.

Pleading—Statement of Defence—Application to Strike out Irrelevant Matter.

Motion by plaintiff to strike out the 6th and all following paragraphs of the statement of defence of defendant Annie Malaney.

F. A. Anglin, K.C., for plaintiff.

W. J. Clark, for defendant Annie Malaney.

THE MASTER.—I have carefully perused the pleadings, and I am of opinion that the motion must be granted. The plaintiff's claim is to have a contract cancelled on the ground of misrepresentation and undue influence. This is denied, in the first paragraph of the statement of defence, by the defendant, who gives her account of the matter in the next four paragraphs, which are not objected to. Those which follow are clearly irrelevant and embarrassing. They consist of allegations of the attempts made since the commencement of the action by defendants' solicitors to reach some settlement. For this attempt they are much to be commended, but I fail to see how it can form any ground of defence to plaintiff's claim. *Stratford Gas Co. v. Gordon*, 14 P. R. 407, only decides that nothing should be struck out that may possibly be useful to defendant. But it does not decide that defendant can plead anything that he thinks may assist his defence. The statement of defence should be struck out, either in whole or as asked by plaintiff, with leave to defendant to amend or file new defence in 10 days. Costs of motion to plaintiff in any event.

trust that for the sake of the comparatively small amount of costs involved, this case will not be a repetition of Lang, 17 P. R. 203, 18 P. R. 1.

WRIGHT, MASTER.

APRIL 21ST, 1903.

CHAMBERS.

DEVER v. FAIRWEATHER.

for Costs—Application for Increased Security—Inadequacy of Amount Fixed by Rules.

tion by defendant for increased security for costs.

N. Ferguson, for defendant.

W. Eyre, for plaintiff.

THE MASTER.—The usual præcipe order for security for costs was issued on the 29th October last. This was complied with by plaintiff, who paid \$200 into Court. I think it is not, therefore, now set up that he is possessed of property within the jurisdiction so as to absolve him from the necessity of giving further security. I think I must deal with the question, how much, if any, additional security should be given under the facts disclosed in the material.

The foundation of the practice of ordering security for costs would seem to be the right of a defendant to call upon the resident plaintiff for indemnity. In such a case the defendant is seeking to use the Court to enforce some claim against the opposite party, while he keeps himself out of the jurisdiction. The defendant, then, being entitled to indemnity, is within his rights in asking to have a substantial security, not an illusory security.

When the present sum of \$200 was settled as adequate, it was really so. Those were the days in which an eminent counsel was content with a fee of \$20 on a brief for a defendant out of Toronto for a defendant railway corporation.

If counsel to-day of equal eminence were to be confronted with such charges, I fear that doubts would be entertained of their sanity. In view, then, of the great increase in the cost of litigation, it is right that a corresponding increase should be made in the amount fixed for security. Such security should properly be given.

Having regard to the affidavit filed by defendant in support of the application, which is not contradicted in any way, and in view of the case being ready for trial, I direct that the plaintiffs do furnish additional security by paying into Court within ten days, with a stay of proceedings until this is done.

CARTWRIGHT, MASTER.

APRIL 23RD, 1903.

CHAMBERS.

LEMOINE v. MACKAY.

Evidence — Foreign Commission — Postponement of Trial — Delay — Security for Costs.

Motion by defendant for a commission to examine witnesses in England and Ireland, and to postpone the trial in the meantime. The action was at issue, and the plaintiffs had given notice of trial for the jury sittings at Ottawa commencing on the 30th April. The action was brought to establish the will of defendant's father.

R. McKay, for defendant.

A. B. Aylesworth, K.C., for plaintiffs.

THE MASTER.—The action is really one by the defendant to set aside the will of his father, who died on 1st December last, leaving an estate of between \$1,200,000 and \$1,300,000. The testator left seven children. To six of them the whole of this estate was left, with the exception of a comparatively trifling amount to defendant. The testator in his lifetime had given each of the seven children \$100,000 by way of advancement. The allegations in the statement of defence are the usual charges of want of testamentary capacity, undue influence on the part of the other beneficiaries, etc. The usual affidavit is made by the solicitor for defendant, stating that the evidence of the witnesses sought to be examined under the commission is "absolutely necessary in the interests of the defendant." . . . Affidavits were filed in answer alleging that the evidence sought for by defendant would be immaterial and of no assistance, and asserting that there were strong reasons why the trial should not be postponed. These, however, are fully met by the powers given to the executors under the orders of 4th February and 14th March appointing them administrators ad litem, and empowering them to invest the funds of the estate pending the result of this action. They need have no hesitation in making any necessary advances to any of the six substantial beneficiaries, as counsel for the defendant undertakes not to dispute any of the payments so made.

I am, therefore, clearly of opinion that my discretion can only be exercised by allowing the motion as asked. The usual time for the Ottawa autumn assizes is early in September, so that no great delay will result from the postponement of the trial. . . .

The hardship of delay was the main argument urged by the counsel for the plaintiffs. . . . But fully recognizing the hardship, I still say that, looking at the facts of the

case, it is difficult to imagine one in which a delay of six months at the outside five months imposes less hardship or inconvenience of any kind on the plaintiffs. . . . I wish to add as an additional argument in favour of de-
 manding all reasonable facilities for presenting his
 claim that his share under the will is abundant security (at
 least) for any costs that may hereafter be given
 him, if he should fail in his contention.

APRIL 24TH, 1903.

C.A.

CAVANAGH v. CASSIDY.

Leave to Appeal—Security for Costs—Residence of Plaintiff.

Application by plaintiff for leave to appeal from order of a
 Divisional Court (ante 303) reversing order of BRITTON, J.
 (ante 43) and restoring order of Master in Chambers (ante
 43) which required plaintiff to give security for costs, and
 to give security with security.

B. Woods, for plaintiff.

C. Cook, for defendant.

Judgment of the Court (MOSS, C.J.O., MACLENNAN,
 W. MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—We think no special circumstances are
 shown to justify a further appeal in this case. We are un-
 able to see that the Divisional Court has laid down any rule
 of practice or adopted any construction of Rule 1198 'not in
 accordance with Allcroft v. Morrison, 19 P. R. 59. The utmost
 that can be said is that the Court erred in its view of the
 facts of the case. But error of that description, even if
 it cannot be accepted as a sufficient ground, by itself,
 does not exercise by the Court of the discretion vested in it.

We do not, however, disagree with the view of the Divi-
 sional Court. A perusal of the voluminous material put in
 in this application leads towards the same conclusion. Be-
 fore October, 1902, the plaintiff was undoubtedly ordinarily
 resident out of Ontario, and he seems to have failed to estab-
 lish that he is now more than temporarily resident here.

Even if we had thought the case a proper one for giving
 leave to appeal, no ground is made for dispensing with the
 requirement of security. In order to deprive the respondent of the
 benefit of security, which is given him by Rule 826, circum-
 stances of an exceptional nature must be shewn. These
 are not shewn in Fahey v. Jephcott, 1 O. L. R. 198. But the want
 of means or resources has not been deemed a sufficient cir-
 cumstance: Thuresson v. Thuresson, 18 P. R. 414. And
 there is nothing else in this case.

Application dismissed with costs.

CARTWRIGHT, MASTER.

APRIL 25TH, 190

CHAMBERS.

MEIERS v. STERN.

Venue—Omission to Lay—Amendment—Change of Venue—Convenience—Affidavits—Jury Notice.

Motion by defendant Stern for an order striking out the plaintiff's jury notice and directing that the action be tried at Toronto.

Grayson Smith, for applicant.

Blackwood (Blake, Lash, and Cassels), for plaintiff.

THE MASTER.—The statement of claim was irregular in this, that no place of trial was named therein. Plaintiff now wishes to amend by inserting Bracebridge, while the defendant urges that the trial ought to be at Toronto. . . . Bracebridge was named in the writ of summons as the place of trial, but through some mistake it was omitted in the statement of claim. Under these circumstances the plaintiff should be allowed to amend.

The only question is, whether the trial should be at Bracebridge or Toronto. As to any preponderance of convenience, little, if any, weight can be attached to affidavits. [Reference to *Frawley v. Town of Parkdale*, unreported; *McArthur v. Michigan Central R. W. Co.*, 15 P. R. at p. 78; *Greey v. Siddall*, 12 P. R. at p. 559.]

In this case I am of opinion that it would be a great inconvenience to plaintiff and his witnesses to go from Uxington to Toronto than for the defendant and his witnesses to go to Bracebridge. The assizes there are not usually lengthy, and the greater expense should not be thrown on plaintiff without good cause.

[Reference to *Standard Drain Pipe Co. v. Town of Fawcett*, 16 P. R. 404, and *Halliday v. Township of Stanley*, ib. 493.]

The writ of summons is not before me; but in the affidavit of plaintiff's solicitor it is stated that there Bracebridge was given as the place of trial. This is not denied. I think, therefore, that plaintiff can derive some assistance from the principle of the decision in *Segsworth v. McKinnon*, 19 P. R. 178.

I am, therefore, of opinion that the affidavits in this case, taking them for what they are worth on both sides, do not make out a case for change of venue. The omission of the place of trial was, no doubt, a mere slip on the part of plaintiff's solicitor, which defendant might well have consented to have remedied, though not in any way obliged to do so.

The plaintiff will, therefore, have leave to amend as he desires, the jury notice will be struck out, and the costs of this motion will be to defendant Stern in the cause.

THE TARIO WEEKLY REPORTER.

(TO AND INCLUDING MAY 2ND, 1903.)

II. TORONTO, MAY 7, 1903. No. 17.

ON, J. APRIL 27TH, 1903.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. TENNANT.

*Summons—Renewal—Efforts to Ascertain Whereabouts of
Defendant—Statute of Limitations—Order for Renewal—Appli-
cation to Set aside—Discretion.*

Appeal by defendant from order of Master in Chambers
(277) dismissing motion by defendant to set aside ex
order for renewal of writ of summons, the renewed writ,
the service thereon upon defendant.

H. Tennant, for defendant.

L. McCarthy, for plaintiffs.

MITTON, J., affirmed the Master's order and dismissed
appeal with costs.

MAHON, J. APRIL 27TH, 1903.

TRIAL.

BAWTINHEIMER v. MILLER.

*Construction—Devise—Event—"Or"—"And"—Executory Devise
Proof of Will—Registration—Death of Witnesses.*

Application to recover possession of land from defendant
and to have it declared that a conveyance of the land
with Bawtinheimer to the defendant Sealey, and a deed
conveyed to defendant Miller, and a mortgage by Miller to
the plaintiff were clouds on the title which should be removed.

The plaintiff was a son of James M. Bawtinheimer, who
died in 1849, leaving a will, by which he devised his farm in
part to his eldest son, Levi, subject to support the family,
and his son Smith and his heirs testator devised his farm
in part (the land in question)—"the said farm is to be kept

let or rented, the rentage to be applied for the use of the family until my said son shall arrive at the full age of 21 years, when he shall be put into possession of said farm." The testator charged this farm with certain legacies to his daughters, and he made provision for a third son, James, the plaintiff. He then provided that "should any of my sons die before becoming of age or without having lawful children, in any of these cases the property bequeathed to such shall be equally divided betwixt the surviving sons," etc. Smith Bawtinheimer entered into possession of the farm devised to him in April, 1857, and attained his majority in June of that year. He was married in 1861, and died in 1894, without leaving any children. He occupied the farm until 1864, when he leased it. On 1st December, 1881, he sold and conveyed the farm to defendant Sealey for \$5,000. Sealey stated that during the 17 years he owned it, he made permanent improvements to the value of about \$2,000. Sealey sold and conveyed to defendant Miller in February, 1899, for \$4,000.

After the death of Smith neither of the brothers made any claim to the farm until 1901. On 3rd October, 1901. Levi quitted claim in the 100 acres to James, who thereupon brought this action.

G. F. Shepley, K.C., and G. F. Mahon, Woodstock, for plaintiff.

E. D. Armour, K.C., and W. T. Evans, Hamilton, for defendant Sealey.

W. W. Osborne, Hamilton, for defendant Miller.

MACMAHON, J.—There was produced by plaintiff at the trial, from the registry office of Brant, a copy of what was called "a memorial to be registered pursuant to the statutes in that behalf of a will written in words following." Then follows a verbatim copy of the will of James M. Bawtinheimer. There is attached to this copy of the will a copy of a certificate of the Judge of the County Court of Brant, dated 4th October, 1876, "that I am satisfied from the proof adduced by Levi Bawtinheimer, being the evidence of Thomas Turnbull . . . who states under oath that he knew the above named testator and the witnesses respectively of the above will . . . and the handwriting of the said testator and the said witnesses respectively, and that the signatures of the said testator and of the said witnesses are the proper handwriting of the parties respectively, and that the testator and the said witnesses are all dead, with the due execution of the above will and codicil; the said Levi Bawtinheimer being a devisee under the said will." . . . The will was not registered till 8th June, 1880.

this is not a memorial of the will. Had it been, it would have required the affidavit of one of the witnesses to the will for it could be registered. The words "a memorial to be registered," etc., are merely surplusage. . . .

There was produced at the trial from the registry office at Milton a copy of the certificate of the Judge of the County of Halton, dated 29th November, 1880, similar in effect to the certificate above quoted. Attached to this certificate was a copy of the will, to which is attached an affidavit of one of the witnesses stating that he had compared the copy intended to be deposited in the registry office with the original will, and that it was a true copy. . . .

The widow of Smith Bawtinheimer said that her husband owned the farm, and had registered the will in his name; that the will was kept by her husband in a desk, and was there at the time of his death; and five years after he died she was sorting some letters and papers in the desk, and, finding the will was of no more use, had burned it.

The witnesses to the will being dead long prior to the year 1880, the only way in which Smith Bawtinheimer could have effected the registration thereof was under sec. 47 of the then Registration Act, R. S. O. 1877 ch. 111. . . .

When this will was registered in Milton on the 29th November, 1880, the Act R. S. O. 1877 ch. 111, sec. 63, required that every will should be registered at full length by the production of the original will and the deposit of a copy thereof with an affidavit sworn to by one of the witnesses to the will proving the due execution thereof by the testator, etc.

The plaintiff gave notice under sec. 41 of the Evidence Act, R. S. O. 1897 ch. 73, that he intended to give in evidence in proof of the devise to Smith Bawtinheimer, the letters of administration with a copy of the will annexed. . . . The letters of administration were not issued until the 29th November, 1902; the will and codicil had been destroyed in 1887; the letters recite their destruction and that copies had been presented to the Surrogate Court.

[Reference to *Sugden v. Lord St. Leonards*, 1 P. D. 154; *Andale v. DeValmar*, 57 L. T. N. S. 556; *Fairfield v. Man*, 2 B. & P. (N. R.) 38; *Wright v. Marson*, 44 Sol. J. 1; *Hauer v. Sheetz*, 2 Binn. (Pa.) 537; *Doe d. Forsythe v. Kenbush*, 10 U. C. R. 148.]

In the present case is, I consider, governed by the authorities which I have referred to, and I hold that the word "or" must be read "and," and the double event of Smith Bawtinheimer dying before the age of 21 years and without lawful children,

must have happened before the executory devise over could take effect. . . .

Judgment dismissing action with costs.

APRIL 27TH, 1903.

DIVISIONAL COURT.

BISNAW v. SHIELDS.

Master and Servant—Injury to Servant—Death—Negligence of Master—Evidence—Res Ipsa Loquitur.

Appeal by plaintiff from judgment of MEREDITH, C.J., dismissing action brought by widow of Joseph Bisnaw to recover damages for his death, which she alleged was caused by the negligence of defendants.

The deceased had been for some years in the employment of defendants at a derrick used by them for hoisting coal out of vessels on the river St. Lawrence and loading it upon cars. The deceased was going down a ladder when he was struck on the head and killed by a piece of coal which fell from some part of the derrick.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. M. Clark, K.C., for plaintiff.

E. E. A. DuVernet and J. J. Mahaffy, Streetsville, for defendants.

STREET, J.—Assuming the fact to be that this derrick had been worked for 15 years with the same appliances and in the same condition, and that during that time no coal had fallen over the platform until the fall of the piece by which the plaintiff was killed, is there reasonable evidence of negligence on the part of defendants? The Chief Justice has said that these facts negative any negligence. With great respect, I feel bound by authority to come to the opposite conclusion: *Scott v. London Dock Co.*, 3 H. & C. 596; *Kearney v. London, Brighton, etc., R. W. Co.*, L. R. 6 Q. B. 759. . . .

There was also, I think, evidence of negligence in another respect. The opening in the platform through which the coal was shot from the upper hopper into the lower one was marked and scored all around its edges by the coal striking as it passed down; and witnesses for defendants also stated that pieces of coal occasionally escaped on to the platform, instead of passing through the opening, although they said the pieces were not large. Now, the edge of the platform was only 3 feet 9 inches from the nearest edge of the opening, and there was nothing to prevent a piece of coal which

ped to the platform in falling from the hopper from over the edge of the platform if it rolled that far. s, it seems to me, therefore, put defendants into this . If the derrick was safe with ordinary care, with- fence along the edge of the platform, then there must n a lack of ordinary care on the part of defendants or vants for which defendants are liable. On the other coal was liable to escape even with the exercise of care, defendants were negligent in not having a ng the edge of the platform to prevent it from fall- a. al allowed with costs, and judgment to be entered iff for \$1,000 with costs.

TON, J., gave reasons in writing for the same con-

ONBRIDGE, C.J., concurred.

APRIL 28TH, 1903.

DIVISIONAL COURT.

HARRISON v. HARRISON.

*—Construction—Agreement to Farm on Shares—Account—
t—Contradictory Evidence—Findings of Fact—Costs—Dis-
t.*

al by defendant from judgment of County Court of dward in favour of plaintiff for \$50.29 with County sts.

tiff was the son of defendant, and had rented from shares a farm and some stock and implements. and defendant disputed afterwards as to what were s of their bargain, and as to certain matters of ac- and this action was brought to determine the dispute. as also a counterclaim by defendant. The case was hout a jury, and the evidence was contradictory.

ppel was heard by STREET and BRITTON, JJ.

Macnee, Picton, for defendant.

Widdifield, Picton, for plaintiff.

COURT refused to interfere with the findings of the f the County Court, and also declined to interfere discretion in awarding the plaintiff County Court hough the amount recovered was within the Divi- urt jurisdiction, and in giving no costs of the aim; but varied the final judgment so as to make pond with the findings of the Judge; and, subject to ation, dismissed the appeal without costs.

APRIL 28TH, 1903.

DIVISIONAL COURT.

PUTERBAUGH v. GOLD MEDAL CO.

Libel—Proof of Publication—Letter Given to Clerk to Copy—Privilege—Amendment—New Trial.

Motion by defendants to set aside verdict and judgment for plaintiff in an action for libel tried before MACMAHON, J., and a jury, and for a new trial, or to dismiss the action. The action was first tried before MEREDITH, C.J., and a jury, but the jury disagreed, and the trial Judge refused a motion by defendants for judgment: 1 Q. W. R. 250.

The plaintiff was employed by defendant company, and defendant Abra was acting manager of one of the departments of the company's business. Abra discharged plaintiff for misbehaviour, and was informed a day or two afterwards that plaintiff when leaving had taken away with him certain patterns belonging to the company. Thereupon he drafted a letter to plaintiff demanding their return, pointing out that their removal was a threat, and threatening prosecution if they were not returned. He gave the draft letter to a clerk, who wrote it out on a typewriter and sent it to plaintiff. This was the only publication of the letter.

Defendant company denied that the letter was written with their authority. Defendant Abra pleaded, in effect, that the occasion was privileged, that there was no malice, and that the statements were true.

The motion was heard by STREET and BRITTON, JJ.

F. C. Cooke, for defendants.

J. E. Jones, for plaintiff.

STREET, J.—The occasion of the writing of the letter complained of was a privileged occasion. Abra was in charge of the department in which plaintiff was employed. . . . In writing a letter and demanding a return of the property taken, he was clearly performing a duty he owed to the company, and if the letter were written without malice, no action would lie in respect of it.

My brother MacMahon appears, however, to have ruled that the publication of the letter . . . did not come within the privilege, and took it away, upon the authority of *Pullman v. Hill*, [1891] 1 Q. B. 524.

The later cases . . . have, however, introduced distinctions which have cut down to narrow limits the effect of that decision; and *Boxsius v. Goblet*, [1894] 1 Q. B. 842, is authority for the position that the publication by Abra to

s typewriter, in the ordinary course of the correspondence of the company, did not take away the privilege, but was entirely consistent with its existence.

The result of the ruling seems to have been that the case went off upon the question of the authority of Abra to write the letter and his plea of justification, and that the defence privilege was not gone into. . . . Plaintiff's case against the company is founded upon the assertion that they authorized Abra to write the letter, and the jury have so found, and, if the finding is correct, the privileged occasion created by Abra should be a protection to them. In order to save complication, they should have leave to amend by reading privilege. . . . There was evidence to go to the jury sufficient to sustain the finding that the letter was their letter.

Judgment for plaintiff set aside without costs, and new trial ordered without costs, with leave to defendant company to amend.

BRITTON, J., gave written reasons for the same conclusion, referring to *Lawless v. Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 20; *Harper v. Hamilton Retail Grocers' Co.*, 32 O. R. 295; and *Nevill v. Fine Arts, etc., Co.*, [1895] Q. B. 156.

ARTWRIGHT, MASTER.

APRIL 29TH, 1903.

RE SMITH AND BENNETT.

Interpleader—Application for Order—Executor—Adverse Claims to Estate—Failure to Obtain Probate—Delay in Applying—Discretion—Other Remedy.

Motion on behalf of one Kipp for an interpleader order. Harriet E. Wilcox died on the 22nd October, 1902, leaving a will dated 6th August, 1902, in which the applicant and one E. L. Moore were named as executors. The latter renounced, and Kipp applied for probate of the will, but did not proceed with his application because one Mae Smith claimed the whole estate of the testatrix under a trust deed made in June, 1901. The estate was also claimed by creditors and legatees under the will. In consequence of the conflicting claims, the property being in the hands of Kipp, he applied for an interpleader order.

W. A. Dowler, K.C., for applicant.
E. Meek, for Mae Smith.
F. W. Harcourt, for infant.
A. G. F. Lawrence, for E. L. Moore.
J. H. Spence, for Dr. Bennett.

THE MASTER.—It is to be borne in mind that the order of interpleader is not in any sense a matter of right. The granting of such an order is always in the discretion of the Court. That it is not in every case of conflicting claims that the order will be granted, is shewn by such cases as *Farr v. Ward*, 2 M. & W. 884; *James v. Pritchard*, 7 M. & W. 216; *Randall v. Lithgow*, 12 Q. B. D. 525. Now, in this case has not Mr. Kipp been the cause of his own difficulty? At present the estate of Mrs. Wilcox is without any personal representative. It was open to Mr. Kipp to have proceeded with his application for probate. So far there has been no suggestion of any opposition to the issuing of the letters probate. Once they were issued he would have been entitled to have retained all the assets of the testatrix in his hands, and these would have given him ample indemnity for any costs occasioned in resisting the claims of either Mae Smith or E. L. Moore, while he would have been enabled to settle with claims of the creditors, which are not very large. . . . Six months have gone since the death of Mrs. Wilcox, yet the applicant has neither taken out probate, nor renounced so that some one else could do so. The motion for an order of interpleader should always be made promptly. But in this case there is unexplained delay. . . . At the beginning of November Kipp was notified of the terms of the trust deed. The applicant was then in possession of all the knowledge he has now; and for this reason, if for no other, the order should be refused, even if he were otherwise entitled to this relief. I refer to *Flynn v. Cooney*, 18 P. R. at p. 325.

On a consideration of the undisputed facts, I am of opinion that the motion fails, and must be dismissed with costs. It was entirely unnecessary, and can only have been made under a misconception. The applicant's duty was to have taken out probate, and more promptly than ever on learning of the claim of Mae Smith. He could then have obtained a judgment for administration under Rule 950, and in the Master's office all the conflicting claims would have been investigated and the rights of all parties adjusted, with full protection to himself.

CARTWRIGHT, MASTER.

APRIL 30TH, 1903.

CHAMBERS.

CAYLEY v. GRAHAM.

Judgment—Default—Application to Set aside—Delay—Discovery of Defence after Three Years—Condition of being allowed to Defend—Payment into Court—Invalidity of Proposed Defence.

Motion by defendant to set aside a judgment entered

December, 1899, upon default of appearance, and for to appear and defend.

Evans-Lewis, for defendant.

D. Delamere, K.C., for plaintiffs.

THE MASTER.—The facts of the case are not in dispute. Action was to recover the amount due on a mortgage made by defendant on 4th March, 1889. Subsequently defendant conveyed the mortgaged premises to one Hall, who on 4th May, 1889, conveyed the same to W. B. McMurrich as a trustee for the Rathbun Company. By deed of 4th February, 1898, McMurrich conveyed to the plaintiffs, the mortgagees. One of the plaintiffs made affidavit that this deed was never registered, but only held as an escrow, to be used for the purpose of making title in case of exercising the power of sale. . . .

At the time of the service of the writ of summons, in November, 1899, defendant thought he had no defence, and entered judgment to go by default. He has since become aware of the existence of the unregistered instrument executed by McMurrich, and has been advised that the effect of the instrument was to release him from all liability under the mortgage as effectually as if it had been discharged by the plaintiffs. His counsel stated at the argument that it would be possible to give security for the judgment, if that were a term of being allowed in now to defend. . . .

There are, in my opinion, three fatal objections to the motion.

First, it is clear under *McVicar v. McLaughlin*, 16 P. R. 145, that no relief could be given unless defendant were able to pay into Court a substantial part, if not the whole, of the amount due on the judgment.

Second, that under the previous case, and the authorities therein, the delay has been too great. To the same effect is . . . *McLean v. Smith*, 10 P. R. 145.

Third, the proposed defence was stated to be based on statements in the opinions of the Judges in *Scarlett v. Attestress*, 23 A. R. 297. . . . The facts in that case distinguish it from the present case. There was no undertaking by McMurrich to assume the mortgage in question.

. . . *Bourne v. O'Donohoe*, 17 P. R. at p. 524, referred to. Motion dismissed with costs.

MORSON, JUN. CO.J.

APRIL 28TH, 1903.

TENTH DIVISION COURT, YORK.

WICKETT v. GRAHAM.

Division Courts—Attachment of Debts—Remuneration of Alderman—Debt Due or Owning—Statutory Obligation—Time of Service—Public Policy.

This was an action on a promissory note for \$100 and interest and notarial, made by J. J. Graham, the primary debtor, in favour of Hector Lamont, and by him indorsed over to S. R. Wickett, the primary creditor. The corporation of the City of Toronto were made garnishees, and the remuneration due the primary debtor as alderman, was attached in their hands.

M. H. Ludwig, for the primary creditor.

H. L. Drayton, for the primary debtor, did not dispute his liability on the note, but contended that his aldermanic remuneration was not garnishable, on two grounds: (1) Because it is not a debt due, within the meaning of the Division Courts Act. (2) Even if it were, it is exempt on the ground of public policy.

MORSON, JUN. CO.J.—By sec. 179 of the Division Courts Act, to entitle a primary creditor to judgment against a garnishee, there must be at the time of the service of the summons on the garnishee, a debt due or owing from the garnishee to the primary debtor; and by sec. 192 of the same Act, there must be an amount owing from the garnishee to the primary debtor. Now, the word "owing" implies a debt, and a debt in law is, whatever one owes, or a sum of money due by virtue of an agreement, express or implied; so that in order to entitle the primary creditor to succeed in this case against the garnishees, the corporation of the city of Toronto, he must shew that there was a debt of this nature due by the corporation to the primary debtor at the time of the service of the garnishee summons upon them. By 57 Vict. ch. 50, sec. 3, in cities having a population of 100,000 or over, the right is given the city council, by by-law, to remunerate the aldermen in an annual amount not exceeding \$300. In pursuance of this Act, the council of the city of Toronto, on the 4th June, 1894, duly passed a by-law (No. 3255) by which the aldermen are allowed and paid \$300 per annum in equal quarterly payments on the last days of March, June, September, and December in each year. It is the remuneration under this by-law that is now garnished.

Is this, then, a debt such as I have described, arising out of a contract, express or implied? It clearly is not,—but is only an obligation to pay, arising out of, and by force of, the

e and by-law referred to; in other words, a statutory
tion, and not a contractual one,—not one arising out of
ract express or implied, and therefore not a debt within
eaning of the Division Courts Act, and so not garnish-
see *Central Bank v. Ellis*, 20 A. R. 364. Even if it was
t within the meaning of the Division Courts Act, it was
rned at the time of the service of the summons upon the
ration, because the service was made three days before
remuneration was payable under the by-law. Salary or
not fully earned is not garnishable: *Wilson v. Fleming*,
A. R. 601, and cases therein referred to. It becomes now
ecessary for me to decide the other contention, that the re-
eration is exempt on the ground of public policy. I must,
fore, hold that the remuneration due the primary debtor
erman is not garnishable, for the reasons I have stated,
give judgment against the primary debtor, on the note,
costs, and dismiss the claim as against the garnishees
ut costs.

WRIGHT, MASTER.

MAY 2ND, 1903.

CHAMBERS.

HISEY v. HALLMAN.

*—Change of—County Court Action—Convenience—Number of
Witnesses—Prejudice—Fair Trial—Undertaking to Pay Addi-
tional Expense.*

otion by defendant to change venue from Toronto to
n in a County Court action.

E. Jones, for defendant.

J. Martin, for plaintiff.

THE MASTER.—By Rule 1219 power is given to change
venue in County Court actions “according to the practice
orce in the High Court.” What this is, I had occasion
nsider in *Meiers v. Stern*, ante 392. . . . This action
ought on an agreement under seal made 21st December,
by defendant with one Daly, and assigned by Daly to
tiff. At the foot of the agreement is a memorandum
encil, written, as it would seem, by defendant himself,
signed with his initials, which seems to be intended to
d against the setting up of the defence of fraud on which
ndant now seeks to escape. This is really the sole issue
e action. . . . The defendant has had the courage
ear to the necessity of 18 witnesses at the trial to support
defence. . . . In his examination . . . he ad-
his signature to the agreement and to the pencil mem-
dum at the foot, and states that no one was present at
xecution except his wife, the witness Payne, who was
’s agent, and some one else whose name he cannot remem-
. . . The defendant denies the right of plaintiff to bring

this action, and it will therefore be necessary for the latter to prove his status. On the other hand, plaintiff, with comparative moderation, avers that he will require several (9, I think) witnesses, who all reside in Toronto, to prove his case. Probably defendant will be willing to make such admissions in regard to publication and circulation as will render most of these unnecessary. This will reduce the 9 to 3 or 4. . . . Plaintiff is also willing to pay any extra expense occasioned to defendant by the trial taking place at Toronto. Defendant makes a similar offer, if the motion is granted. . . .

Plaintiff and his solicitor swear "that articles of an inflammatory nature denouncing John J. Daly and contracts which he obtained from the farmers have been published in the Plattsville newspaper having a large circulation throughout the county of Waterloo." This fact is not in any way denied by defendant. I think that it may not unfairly be said that this is likely to cause serious prejudice to plaintiff, and that he certainly should not be compelled to have his action tried at Berlin.

I therefore dismiss the motion, with costs to plaintiff in the cause; plaintiff undertaking to pay such amount as the trial Judge may consider reasonable to meet the extra expense (if any) caused by the trial taking place at Toronto, as was first ordered in *McArthur v. Michigan Central R. Co.*, 15 P. R. 77.

FALCONBRIDGE, C.J.

MAY 2ND, 1903.

WEEKLY COURT.

EDGEWORTH v. EDGEWORTH.

Judgment—Default—Opening up—Terms—Alimony.

Appeal by plaintiff from order of local Judge at Windsor setting aside judgment for plaintiff by default in an action for alimony and allowing defendant in to defend.

C. A. Moss, for plaintiff.

S. White, Windsor, for defendant.

FALCONBRIDGE, C.J.—"The excuses given by defendant for his acts of default or omission are unsatisfactory. There is no slip or mistake of a solicitor, but only the client's ignorance and neglect. The terms upon which relief was granted to defendant (payment of costs and an early trial) are insufficient, and the additional term of payment, within the time limited by the order, of \$100 by defendant to plaintiff to enable her to prepare for trial, and of the costs of this application (fixed at \$10), should be imposed. Should there be any question of jurisdiction of the local Judge, or if for any other reason it is so desired, his order as varied may be treated as a substantive order made by me.

THE TARIO WEEKLY REPORTER.

(TO AND INCLUDING MAY 9TH, 1903.)

II. TORONTO, MAY 14, 1903. No. 18.

ON, J. MAY 4TH, 1903.

CHAMBERS.

EMPIRE LOAN CO. v. McRAE.

*Performance—Contract for Purchase of Land—Judgment for
Payment of Price—Extension of Time—Payment on Account—
Forfeiture—Relief against—Final Order of Sale.*

Appeal by plaintiffs from order of Master in Chambers (325) extending the time for payment of the purchase price of land under a judgment for specific performance, allowing the defendant credit on the purchase money of \$500 paid under an agreement, though under the terms of the agreement the \$500 was forfeited.

D. Scott, for plaintiffs.

E. Middleton, for defendant.

MITTON, J.—The question for determination is whether the \$500 is liquidated damages or a penalty. If liquidated damages, it is doubtful if the Court has power to relieve the defendant under sec. 57, sub-sec. 3, of the Judicature Act, as amended by 60 Vict. ch. 15.

The learned Master thinks this a forfeiture, and I agree with him. Forfeiture is penalty for breach of duty or breach of contract, and that is precisely, in reality, what this agreement is, though in the agreement no such word as penalty or forfeiture is found. Nor is there anything in the agreement which liquidates the damages. If not liquidated damages, what is it? If not a penalty? If there were damages, even to a small amount, which by agreement the parties liquidated at \$500, I would not interfere. But here there are no damages. The agreement is ingeniously so drawn as to enable plaintiffs to retain, without giving credit for it, the \$500, if defendant should not be in time with the balance, and so

drawn as to avoid the use of the word "penalty" or "forfeiture," while it leaves default to operate as a forfeiture of this sum. The words are: "If defendant should fail to make payment of the said balance within the time limited therefor, as aforesaid, by the said judgment, then plaintiffs shall not be bound to give credit to defendant for the \$500, and that in this respect time shall be of the essence of the contract." To give effect to this would be to regard the form, and ignore the substance. . . . The plaintiffs are seeking relief. I think it would not be equitable to defendant to compel the payment of the additional \$500 under the agreement in question, and also compel him to accept the land purchased.

Appeal dismissed with costs.

BRITTON, J.

MAY 4TH, 1903.

KINGSTON v. SALVATION ARMY.

Parties—Unincorporated Voluntary Association—Service of Process on—Religious Body Holding Property in Ontario.

Appeal by the defendants "The Salvation Army" from order of Master in Chambers (ante 314) dismissing application by appellants to set aside the service on them of the writ of summons and to strike out their name as defendants.

A. E. Hoskin, for appellants.

D'Arcy Tate, Hamilton, for plaintiff.

BRITTON, J.—While not wholly free from doubt, I agree with the learned Master. It was contended by Mr. Hoskin in his very able argument that this case is on all fours with *Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association*, ante 183. The Salvation Army in this case is sued as a quasi-corporate body, just as defendants in the *Taff Vale Case*, [1902] A. C. 429. . . . The Salvation Army is a large and most important association and organization. It has not been defined or created a corporation by any Act of Parliament. . . . This association has the distinctive name given to it by its founder and head, General Booth. The Army is at work in Canada, and in the declaration of trust by General Booth he says "that the name, style, and title by which the said religious community or society hereinafter described is to be known and recognized is The Salvation Army." . . . Then, this is a "religious community or society," within the meaning of and with the

rs conferred by R. S. O. ch. 307. It seems to me not able to extend non-liability to an association such as the tion Army, if it so happens that some one acting en- within the rules of and for the Army, does a wrong which he himself would be liable. Of course, in deter- ing the question of holding the Army by name as a party e action, I am expressing no opinion on the merits. . . . he general question is an important one; but I cannot the Salvation Army would care to allow the brunt of liability to be borne by McQuarrie and Austin alone, if at they were doing they were merely acting as officers in the interests of the Army.
 appeal dismissed. Costs in cause to plaintiffs.

TON, J.

MAY 4TH, 1903.

CHAMBERS.

NDLER AND MASSEY (LIMITED) v. GRAND
 TRUNK R. W. CO.

*Joinder of—Two Defendants—Different Causes of Action—
 Sale of Goods—Claim against Vendee for Price—Claim against
 Carrier for Loss in Transit.*

appeal by plaintiffs from order of Master in Chambers (286) staying proceedings until plaintiffs elect which of the two defendants the plaintiffs will proceed against, and dismissing the action against the other.

F. A. Sadler, for plaintiffs.

L. McCarthy, for defendant company.

A. Moss, for defendant Kerr.

CRITTON, J.— . . . I have no doubt that as a matter of convenience and saving of expense to all parties, this is where plaintiffs should be at liberty to join defendants. There is, however, the question of law. It is contended that Rule 186 applies only to cases of joinder of defendants in reference to one cause of action, and that it has no application to any case where there are two distinct and different causes of action, one against one defendant, or, in the alternative, the other cause of action against the other defendant, if the action arises about the same subject matter. I argued that Rule 192 is limited to cases where the right of relief is founded strictly and technically upon the same cause of action. A careful perusal of the cases cited will not warrant the conclusion that the Rule is absolutely so limited and restricted. . . . [Quigley v. Waterloo Mfg. Co., 1

O. L. R. 606, distinguished.] Here there are technically two causes of action, but . . . there is practically one thing to determine, and that is the liability of defendant company for the destruction of the goods. Plaintiffs must shew, as part of their case, that they are the owners of the goods, and prima facie they were the owners, as they were the shippers; but the defendant company say they have delivered these goods to the other defendant, who was the consignee. The other defendant denies this, and the proper determination is a matter of law depending upon the facts as between the two defendants. . . . The defendant company deny liability for the loss of the property, and they say further, as part of their defence, that plaintiffs are not entitled to sue, as the property has been actually or constructively delivered to defendant Kerr. All that plaintiffs desire is to get pay for this property, if any one is liable for it under the circumstances. The defendant company, it is contended, are liable; and if, at the time of its destruction, this property had been delivered to Kerr, then Kerr is liable to plaintiffs. This seems to me a singularly proper case for the application of Rule 192. There is doubt—a doubt arising only as to what are the facts as between the defendants. [Reference to *Child v. Stenning*, 5 Ch. D. 701; *Harvey v. Grand Trunk R. W. Co.*, 9 P. R. 80, 7 A. R. 715; *Cox v. Barber*, 3 Ch. D. 368; *Honduras R. W. Co. v. Tucker*, 2 Ex. D. 301; *Bennetts v. McIlwraith*, [1896] 2 Q. B. 464; *Tate v. Natural Gas Co.*, 18 P. R. 82; *Evans v. Jaffray*, 1 O. L. R. 614; *Langley v. Law Society*, 3 O. L. R. 245.]

Appeal allowed. Costs in cause to plaintiffs.

BRITTON, J.

MAY 4TH, 1903.

CHAMBERS.

LEMOINE v. MACKAY.

Evidence—Foreign Commission—Postponement of Trial—Delay—Security for Costs—Other Terms.

Appeal by plaintiffs from order of Master in Chambers (ante 390) allowing defendant to issue a commission to take the evidence of witnesses in England and Ireland, and postponing the trial meantime.

A. B. Aylesworth, K.C., for appellants.

R. McKay, for defendant.

BRITTON, J.—Upon the material before me, it is impossible to resist an impression that the application for a

mission . . . is not made in good faith. It is difficult to see how persons at present living in Ireland can speak anything concerning the deceased that will aid in the determination of the issues herein. . . . Deceased left Ireland in 1835, when only 16 years of age. He resided more than 65 years in Canada, conducted a large business, and amassed a very large fortune, which he disposed of by will. The information should have been furnished to shew what circumstances of so long ago, if any, now living, and with memory enabling them to speak, can say affecting the deceased or relevant to the issues as to his will. I will, however, give the defendant the benefit of any doubt, and, as is frequently done in such matters, decline to interfere with the discretion which the Master has exercised in directing the commission: *Morrow v. McDougald*, 16 P. R. 129; *Robinson v. Empire Printing Co.*, 14 P. R. 495.

The order must embody the following terms:

. As to the commission for examination of Walter Macdonald and wife, it is not to issue until after 30th June, and when it appears, or if plaintiffs undertake, that these witnesses will be present at the trial.

. As to the witnesses residing in Ireland, that their names, residences, and occupations shall be furnished to the plaintiffs on or before 30th June next.

. The commission must be returned on or before 1st September next.

. No delay beyond 1st September, so that trial may proceed after that date as if order for commission not made.

Costs to be costs in the cause.

BRITTON, J.

MAY 4TH, 1903.

CHAMBERS.

RE SOLICITOR.

Solicitor—Bill of Costs—Order for Delivery—Rescinding—Special Circumstances.

Appeal by Nancy A. Wilkinson from order of local Judge Hatham rescinding order for delivery by solicitor of a bill of costs to the appellant.

W. J. Clark, for appellant.

R. C. Clute, K.C., for solicitor.

BRITTON, J.— . . . While it is quite possible that the appellant has been unjustly treated by the solicitor, there is a great element of uncertainty introduced into the case

by the answers given by the appellant, and by her refusal to answer upon cross-examination on her affidavit. From what appears, I think it of advantage to the appellant to put an end to this contest about a bill of costs between her and the solicitor, and so dismiss the appeal. . . . I do so because I realize that, under the special circumstances of this case, if the truth between the parties could be arrived at, it would be impossible, where so small amount of money is involved, to give the applicant adequate redress if she should be entitled to succeed.

Appeal dismissed without costs.

FERGUSON, J.

MAY 4TH, 1903.

CHAMBERS.

PREET v. MALANEY.

Pleading—Statement of Defence—Application to Strike out Irrelevant Matter.

Appeal by defendant Annie Malaney from order of Master in Chambers (ante 388) striking out part of statement of defence.

W. J. Clark, for appellant.

F. A. Anglin, K.C., for plaintiff.

FERGUSON, J., affirmed the Master's order, and dismissed the appeal with costs.

CARTWRIGHT, MASTER.

MAY 5TH, 1903.

CHAMBERS.

MORAN v. McMILLAN.

Judgment Debtor—Examination of—Default of Attendance on Adjourned Appointment—Costs.

Motion by plaintiff for an order requiring defendant to attend at his own expense for the conclusion of his examination as a judgment debtor.

W. N. Ferguson, for plaintiff.

F. C. Cooke, for defendant.

THE MASTER.—On the material I have come to the conclusion that there was a misunderstanding between the counsel. No doubt plaintiff's counsel was anxious to have the examination proceeded with at the somewhat unusual hour of 8.30 a.m., and held out hopes of being able to conclude in half an hour. The defendant was equally pleased at the prospect of escaping from the unpleasant ordeal within a

ed and definite period. I do not think I can find that
 tiff's counsel gave any undertaking such as the defend-
 and his counsel not unnaturally thought plaintiff's coun-
 was entering into.

On the whole facts of the present case, I do not think it is
 nguishable from McKinnon v. Richardson, to be found
 275 of the current volume of that most useful publica-
 the Ontario Weekly Reporter. Following the decision
 r. Justice Street in that case, I direct that defendant,
 eing paid his proper conduct money, do attend for further
 mination, and that there be no costs of this order.

TWRIGHT, MASTER.

MAY 5TH, 1903.

CHAMBERS.

BLACKWELL v. BLACKWELL.

*ing—Statement of Claim—Non-conformity with Writ of Sum-
 mons—Amendment—Practice.*

otion by defendants to strike out certain paragraphs of
 statement of claim and of the prayer for relief, on the
 nds "that thereby is set up a new, distinct, and different
 n from that expressed in the writ," and "that, if the
 graphs complained of are allowed to remain on the
 d, it will be a source of inconvenience at the trial."

I. Wilkins, Arthur, for defendants.

. H. Spence, for plaintiff.

THE MASTER.—The material is commendably simple.
 ndants' solicitor files his own affidavit verifying the writ
 statement of claim. The plaintiff's solicitor makes an
 vrit to the effect that, whatever may be the technical
 ularity of his pleading, the whole matters set out in the
 ment of claim are all parts of a regrettable family dis-
 and Mr. Spence asks to have leave to move nunc pro
 to amend his writ so as to conform to the statement of
 a, and to be allowed to add the causes of action set out
 e paragraphs objected to by Mr. Wilkins.

I think there is no doubt that Mr. Wilkins's motion
 technically right. The present case does not come under
 protection of Smythe v. Martin, 18 P. R. 227, nor of
 er v. Noxon, 19 P. R. 327. What the plaintiff should
 done is sufficiently indicated in Hogaboom v. McCul-
 17 P. R. 377. In that case I allowed the plaintiffs to
 d in a way similar to what has been done here. This
 affirmed on appeal by Ferguson, J., and the case has
 followed ever since. In Holmsted and Langton, at

pp. 258, 291, the learned authors speak of the indorsement on the writ being actually amended in such cases. On inquiry at the central office, I was informed that, as a matter of fact, this is not usually done. . . .

The order to be made will be according to the form of that issued in *Hogaboom v. McCulloch*, and the costs of this motion and any extra costs occasioned to defendants thereby will be to them in any event. . . . I refer also to *Patterson v. Central Canada L. and S. Co.*, 17 P. R. 470, as being a very strong case in favour of amendments.

CARTWRIGHT, MASTER.

MAY 5TH, 1903.

CHAMBERS.

BURNSIDE v. EATON.

Security for Costs—Increased Security—Firing Amount—Possible Settlement—Future Applications.

Motion by defendants for an order for additional security for costs to the amount of \$3,000.

W. E. Middleton, for defendants.

J. R. L. Starr, for plaintiff.

THE MASTER.—The facts of this case, so far as material to the present motion, are set out in the affidavit of one of the defendants' solicitors. He goes fully into the matter and gives his reasons for asking a greater sum than has ever been asked for in this Province in any case that I am aware of. . . . I have read over the bulky material furnished me on this motion. I have carefully considered it in the light of the judgment of a Divisional Court in *Standard Trading Co. v. Seybold*, 5 O. L. R. 8, especially remarks of Meredith, J., at p. 13. I think it is a fair deduction . . . that a plaintiff is not to be required in all cases to give security to the utmost limit of his possible and prospective liability, in case of his failure in his action. It may yet be the fact, as all friends of the parties must honestly desire, that this action may never go to trial. In any case no such trial can take place until some time next September or October.

Having all the circumstances of the case under consideration, I think that justice will be done by directing plaintiff to pay into Court a further sum of \$1,200, and that all proceedings be stayed in the meantime. This, of course, will not preclude a further application, if the action should really be proceeded with beyond the limit that the amount then in Court would fairly meet, which I estimate will be up to ser-

of notice of trial. The costs of this motion will be in cause.

BRITTON, J.

MAY 5TH, 1903.

TRIAL.

DELHI FRUIT AND VEGETABLE CANNING CO. v.
POOLE.

*Measure of Goods—Damages for Non-delivery—Measure of Damages—
Claim and Counterclaim—Payment into Court—Costs.*

Action for price of goods sold and delivered. Defendants admitted the claim of plaintiffs, but counterclaimed for damages for non-delivery of 155 cases of canned tomatoes which defendants purchased at \$1.80 a case.

R. A. Dickson, Delhi, for plaintiffs.

J. G. Wallace, Woodstock, for defendants.

BRITTON, J.—The weight of evidence is in favour of defendants' contention . . . There was a memorandum in writing sufficient to satisfy the Statute of Frauds; but, apart from this, the goods purchased by defendants were one lot, in the order, including the tomatoes in question, and there was no part delivery of these goods. . . . The measure of damages is the difference in price between what the tomatoes were worth in the market when plaintiff should have delivered, and what defendants agreed to pay. Plaintiffs are entitled to costs of action and defendants to costs of counterclaim. The amount of damages allowed to defendants together with the amount paid into Court by defendants amount exactly to plaintiffs' claim. The money paid into Court to be paid out to plaintiffs.

BRITTON, J.

MAY 5TH, 1903.

TRIAL.

ANDERTON v. MONTGOMERY.

Settlement of Action—Consideration—Forbearance—Costs—Enforcement—Judgment.

Action by judgment creditors of defendant Robert Montgomery against him and his wife to have a certain mortgage made by one Labrash to the wife, upon lands in the township of Ferrie, made exigible for the satisfaction of plaintiffs' judgment, and to have it declared that the wife is a trustee for her husband of the mortgage.

The plaintiffs asserted that there had been a settlement of the action and that they were entitled to a judgment in favour of that settlement.

The authority of defendants' solicitor to act in making the settlement was not questioned; but defendants set up that, as there was no consideration for the alleged settlement, and plaintiffs' position was not in any way changed, defendants had the right to change their minds, and have the case fought out.

On the 8th April—the next sittings of the Court being near—defendants' solicitors wrote to plaintiffs' solicitors stating that there was illness in defendants' family, and that a postponement of the trial would probably be necessary, and inviting an offer of settlement.

On the 9th April plaintiffs' solicitors answered: "If your clients will pay the full amount, enough to satisfy the County Court execution at present in the sheriff's hands, together with the costs of the present action, excluding the costs of the motion to continue the injunction, but including all other costs properly taxable against your clients incurred in endeavouring to realize plaintiffs' claim herein, we will accept same."

On 11th April defendants' solicitors wired plaintiffs' solicitors, accepting the offer.

On 14th April defendants' solicitors wired to plaintiffs' solicitors that their clients instructed them to contest the action.

C. E. Hewson, K.C., and A. E. H. Creswicke, Barrie, for plaintiffs.

H. E. Stone, Parry Sound, for defendants.

BRITTON, J.—I find there was a complete settlement. There was consideration: plaintiffs stayed their hands; they agreed to waive the costs of the motion to continue the injunction; there was a certain amount of forbearance. It was the compromise of the suit, with the stay of proceedings—a mutual settlement of a bona fide dispute, where there were mutual promises; and the consideration for one was the promise of the other.

Plaintiffs are entitled to judgment in terms of settlement, with costs, except costs of motion to continue injunction, and the costs of the trial to be limited to costs of a motion for judgment in terms of settlement.

CARTWRIGHT, MASTER.

MAY 6TH, 1903.

CHAMBERS.

DESERONTO IRON CO. v. RATHBUN CO.

Third Parties—Indemnity—Trial of Issues—Discovery—Directions.

Motion by defendants for directions as to the disposition

the questions raised by a third party notice claiming injury against the Standard Chemical Co.

E. D. Armour, K.C., for defendants .

F. Bicknell, K.C., for third parties.

F. H. Moss, for plaintiffs.

THE MASTER.—The third parties dispute their liability, ask leave to defend either solely or jointly with defendants.

This course was strongly resisted by defendants. Their counsel pointed out that serious embarrassment might result to them if the third parties were allowed to be at the trial on equal footing, as they might be advised to set up a line of defence inconsistent with that taken by defendants.

Failing this, counsel for the third parties asked that the difference between them and defendants should in some way be taken in the other action between the Rathbun Co. as plaintiffs and these third parties as defendants, which is standing for trial at the coming Napanee non-jury sittings. I do not think I have any power to so direct. Even if I had, an examination of the pleadings in that action shews that there are several issues therein raised between the parties. On the other hand, in this action it is only a simple issue between plaintiffs and defendants, viz., whether there has been a breach of the agreement to supply charcoal to plaintiffs. And then the question between defendants and third parties is equally simple, whether or not the third parties are bound to indemnify defendants if they are found liable to plaintiffs. It seems to me that this last question would naturally be best left after the trial of the issue raised between plaintiffs and defendants. If, for example, plaintiffs should fail, then there would be no necessity to follow the question as to the possible liability of the third parties. If, on the other hand, defendants are held liable, then the liability of the third parties would only arise for determination, and should be decided as soon as practicable so as to enable either party to consider the question of appeal. In an ordinary case it might perhaps be assumed that a third party disclaiming any liability should be left to assert that position when actively attacked by defendants, but the circumstances of this case are somewhat unusual. The third parties here may have discovery or have the benefit of the discovery made on the demand of defendants.

Otherwise, I think the order made in *Coles v. Civil Service*, 26 Ch. D. 529, will exactly fit the present case. The parties at the trial will be in a better position to determine the part (if any) the Standard Chemical Co. should be taken to take in the contest between plaintiffs and defendants.

MACMAHON, J.

MAY 6TH, 1903

TRIAL.

AMERICAN COTTON YARN EXCHANGE v.
HOFFMAN.

Sale of Goods—Part of Consignment not up to Sample—Purchaser Retaining Goods—Claim for Damages—Allowance of Set-off—Costs.

Action to recover \$366.34, the price of certain yarn sold and delivered by plaintiffs to defendants.

Defendants counterclaimed for breach of contract in not supplying some of the yarn of the colours ordered, and the consequent loss of profits.

E. Sidney Smith, K.C., and J. Steele, Stratford, for plaintiffs.

G. G. McPherson, K.C., for defendants.

MACMAHON, J. . . . The yarn reached Stratford on 16th September, and on the 17th defendants wrote saying the colours of parcels 2 and 4 were not as ordered. On 20th September plaintiffs directed defendants to return the two parcels to the Indian Orchard Company, by whom they had been dyed. . . . Defendants received and used the rest of the yarn, the value of which amounted to \$195.67, so that the value of the yarn required to be redyed was \$169.89. Defendants sent to plaintiffs samples of the colours for dyeing of the yarns, of which about one-half was not dyed in accordance with the sample colours. Defendants, having ascertained the insufficiency of the two parcels by inspection at Stratford, could have rejected them, stating that the goods were not according to contract, and remained there at the vendors' risk. *Greinoldby v. Wells*, L. R. 10 C. P. 91; *Heilbut v. Hickson*, L. R. 7 C. P. 438.

Instead of doing this, or complying with the plaintiffs' request to ship the yarns to the Indian Orchard Co., defendants refrained from answering plaintiffs' letters, retained the goods, treating them as their own, and sending part of what they retained to be redyed. If defendants had at once sent the yarn to the Hamilton Cotton Co., it could have been redyed in a month . . . There were 443 pounds to be redyed, and it cost defendants \$6 to redye 120 pounds, so that if \$25 is allowed by way of set-off to plaintiffs' claim, it will be fair.

Judgment for plaintiffs for \$340.36, with interest from 16th December, 1901, and costs on the High Court scale. Counterclaim dismissed without costs.

THE TARIO WEEKLY REPORTER.

(To and including May 16th, 1903.)

II. TORONTO, MAY 21, 1903. No. 19.

WRIGHT, MASTER. MAY 9TH, 1903.

CHAMBERS.

PRETTY v. LAMBTON LOAN CO.

*Change of—County Court—Preponderance of Convenience—
Special Circumstances—Apportionment of Costs.*

tion by defendants to change venue in an action in the
Court of York from Toronto to Sarnia, and to trans-
action to the County Court of Lambton.

A. Moss, for defendants.

n MacGregor, for plaintiff.

THE MASTER.—Plaintiff alleges that defendants have
repaid \$150 and seeks to recover that amount. The
for relief is, that defendants may be ordered to furnish
statement of all moneys received by them on account
mortgage for \$350 on certain lands purchased by plain-
d assumed by her, and may be ordered to repay the
The statement of defence simply denies the allega-
f plaintiff and puts her to strict proof thereof.

endants' affidavits state that the cause of action (if
rose in the county of Lambton, where both parties
at the time; that all the witnesses on both sides re-
that county; that defendants will require seven or
witnesses; but what they are expected to prove is not

intiff's affidavits state that she is over 80 years of age,
holly unable either to go herself to Sarnia, or, by
of poverty, to employ counsel at that place or pay
fees. Plaintiff admits execution of the mortgage and
bility to pay it. . . .

eed only refer to Mr. Alexander MacGregor's very use-
cle in 38 C. L. J. p. 433, where all the decisions. re-
and unreported, are collected and analyzed. [Re-
to Davis v. Murray, 9 P. R. 222, 227; Campbell v.

COL. II. O.W.R. NO. 19

Doherty, 18 P. R. 243; Standard Drain Pipe Co. v. Town of Fort William, 17 P. R. 404; Berlin Piano Co. v. Truavis, 15 P. R. at p. 70.] . . .

The sole issue is, has there been any overpayment as alleged by plaintiff, or was there a settlement made in 1898? Why defendants refuse to furnish plaintiff's solicitor with a copy of what must be a very short account in the ledger, I do not understand. The production of this statement even now might very possibly put an end to the action. So far as I can see, only one witness would be required on this head—the account. Then, as to the alleged settlement, it appears it was made on behalf of plaintiff by the gentleman who is now the solicitor for defendants. It is stated that he paid to defendants what was due, as he thought, on the admitted mortgage, and paid the balance on plaintiff's order to another solicitor. Of these facts these two gentlemen would be the only necessary witnesses.

In face of plaintiff's affidavits, the statements as to assets and poverty not being denied, I cannot see my way to granting defendants' motion. I do not find any such preponderance as would satisfy the rule laid down by the Court of Appeal in *Campbell v. Doherty*. The refusal of their motion will perhaps induce defendants to comply with the very reasonable request of plaintiff's solicitor; and in this way the action may come to an end before trial—a result highly beneficial to all concerned. However that may be, I think I must dismiss the motion, leaving the trial Judge to apply the principle of *McArthur v. Michigan Central R. W. Co.*, 15 P. R. 78, and making the costs of this motion costs in the cause to plaintiff.

MEREDITH, C.J.

MAY 11TH, 1900

CHAMBERS.

DESERONTO IRON CO. v. RATHBUN CO.

Third Parties—Indemnity—Trial of Issues—Discovery—Directions

An appeal by the Standard Chemical Co., third party, from order of Master in Chambers (ante 414) giving directions for trial of questions raised.

J. Bicknell, K.C., for appellants.

E. D. Armour, K.C., for defendants.

J. H. Moss, for plaintiffs.

MEREDITH, C.J., varied the order by allowing the third parties to take part in the trial, and directing that they should have notice of all proceedings. Costs reserved.

, J.

MAY 11TH, 1903.

CHAMBERS.

RE TAGGART v. BENNETT.

*Inter Appeal—Right of Appeal — Final Order — Refusal to
Minutes of Judgment—Duty of Judge to Certify Proceed-
ings where Appeal does not Lie—Set-off of Costs.*

on by plaintiff for a mandamus to compel the Judge
County Court of Middlesex to certify the proceedings
case, pursuant to sec. 55 of the County Courts Act,
permit an appeal to a Divisional Court against an
the Judge dismissing an application to vary the
of the judgment in this action.

. Bartram, London, for plaintiff.

. M. Flock, London, for the Judge.

ron, J., held that the proposed appeal would not lie,
not being a final order within the meaning of sec.
County Courts Act. *Blakey v. Latham*, 43 Ch. D.
on and Canadian L. and A. Co. v. *Morris*, 19 S. C. R.
Pherson v. *Wilson*, 13 P. R. 339, *O'Donnell v. Guin-*
O. R. 389, *Fisken v. Stewart*, 17 C. L. T. Occ. N.
Water v. Hunter, 18 C. L. T. Occ. N. 114,
Stings v. Ernest, 7 U. C. R. 520, referred to.
that the fact that there is no appeal from this order
son why the County Court Judge should not certify
rs. Whether an appeal lies or not, is a question for
t appealed to. The Judge's duty is ministerial, and
icate should as a rule be given on request. But in
plaintiff does not desire the mandamus, if the order
e successfully appealed against. Semble, also, that
ag off of costs (which was the thing objected to by
on to vary the minutes) is no part of what is ordin-
derstood as settling minutes of judgment.
n for mandamus dismissed without costs.

, J.

MAY 11TH, 1903.

WEEKLY COURT.

ONTARIO POWER CO. OF NIAGARA FALLS.

*Constitutional Law—Powers of Dominion Parliament—Expropriation
Rights—Use of Water Power—Local Work—General Advantage
Canada—Statutory Declaration—Company.*

on by the company for order for possession of certain
which they desired to expropriate for the construction

of their canal and hydraulic tunnel. The owner of the lands had commenced an action for an injunction restraining the company from proceeding with pending proceedings for expropriation; and had given notice of motion for an interlocutory injunction. By consent the present motion was treated as a motion for judgment in that action. A Chambers motion by the company for leave to pay the amount awarded for these lands, less the costs of arbitration and award, was also (by consent) heard with the other motion.

W. Cassels, K.C., and F. W. Hill, Niagara Falls, for the company.

H. S. Osler, K.C., for William Henson, the land owner, contended that the company's charter, being by Dominion legislation, could give no right to expropriate private property, because the work authorized was a local work coming under sec. 92 of the B. N. A. Act, and it had not been declared by the Parliament of Canada to be for the general advantage of Canada, as provided by clause 10 (c).

The Minister of Justice for Canada and the Attorney-General for Ontario were notified, but were not represented.

BRITTON, J.—The company were incorporated by 50 & 51 Vict. ch. 120 (D.) The preamble to the Act is as follows: "Whereas it is desirable, for the general advantage of Canada, that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland rivers, with the object of promoting manufacturing industries and inducing the establishment of manufactures in Canada, and other businesses," etc. . . .

Is it necessary, considering the object of the Act, the subject matter dealt with, and how the corporate powers are to be exercised, that there should be the express declaration by the Parliament of Canada that the works are for the general advantage of Canada? I do not think it is.

1. This Act authorizes the company to contract with any bridge company to carry wires for electric light or other purposes and to connect them with the wires of any company in the United States. That brings the work under exception (a) of cl. 10 of sec. 92 of the B. N. A. Act. That section withdraws from Provincial legislative power any local work or undertaking extending beyond the limits of the Province.

2. This Act deals with navigable rivers. The works, as stated in the Act, may interfere with the navigation of the Welland river. Navigation is specially reserved by sec. 91 of the B. N. A. Act for Dominion legislation.

This company, to do the work contemplated, must have power to deal with "public property" of the Dominion: see sub-sec. 1.

By sec. 108 of the B. N. A. Act, the public works in the provinces in the 3rd schedule shall be the property of Canada, and in this 3rd schedule are canals and lands and waters connected therewith, and rivers. . . .

But the Welland river is not only under the control of the Dominion as a "river," and as a "navigable river," but by C. ch. 28, sec. 10, sched. A., this river is made . . . public property.

If the Dominion Parliament has authority to grant the powers claimed, it is a case of "over-lapping powers," and Lefroy's proposition 37, in his work on "Legislative Power," is applicable. See also pp. 350, 351, 425-468, of the work, and the cases cited.

If the Dominion, and Dominion only, has power over the use of supply of water, the thing of use to the company is chartered, then the Dominion has of necessity power to deal in detail with what is necessary to utilize the water fully for purposes beneficial to Canada: see *Tennant v. Esplanade Bank*, [1894] A. C. 31; *Attorney-General for Ontario v. Attorney-General for Canada*, [1894] A. C. 189; *Regina v. County of Wellington*, 17 A. R. 444; *Bradburn v. Edinburgh Life Assurance Co.*, 2 O. W. R. 253, and cases there.

City of Toronto v. Bell Telephone Co., 3 O. L. R. 465, distinguished.]

But, assuming that it is necessary that there should be a declaration by the Parliament of Canada that these works for the general advantage of Canada, is there not substantially such a declaration in the preamble of the Act of Incorporation? . . . Taking the preamble as a declaration is not construing the statute. . . . The preamble shows the intention of Parliament to give the power and the reason why, and that reason is a parliamentary declaration. Again, may there not be a declaration by implication, or, so far as all parties interested are concerned, would it not amount to a declaration? The Act . . . in giving to the company all the powers of a railway company under the Dominion Railway Act, expressly gives the right to expropriate. . . .

Motion for injunction dismissed and action dismissed. Order to go for leave to pay money into Court and for possession. Costs of this application and motion to be paid by the company.

FERGUSON, J.

MAY 11TH, 1903

TRIAL.

DOWLING v. DOWLING.

Contract—Payment for Services—Proof of Contract—Question for Jury—Motion for Nonsuit.

Motion for a nonsuit in an action tried with a jury at Cornwall. Action for specific performance, or to recover payment for services rendered to defendant on his farm by one of the plaintiffs under an alleged agreement between his father, the other plaintiff, and the defendant.

E. G. Porter, Belleville, for plaintiffs.

J. H. Madden, Napanee, for defendant, contended that no contract had been proved, citing *Iler v. Iler*, 9 O. R. 550, and *Smith v. Smith*, 29 O. R. 309.

FERGUSON, J., held that there was some evidence to go to the jury, and that a nonsuit would be erroneous. If the jury believed the evidence that defendant said, "I will pay him well," it was for them to say what, in all the circumstances and surroundings as shewn by the evidence, was the real meaning, and how it was understood by the parties concerned. Motion for nonsuit refused. The jury having found that there was a bargain whereby defendant promised to pay Robert Dowling the younger in money for his services and that the services were worth \$125 a year, which amounted to \$979.15, judgment to be entered for plaintiffs for that sum with costs.

MAY 11TH, 1903

DIVISIONAL COURT.

HENRY v. WARD.

Principal and Agent—Purchase of Goods by Agent—Commission—Ascertainment of Amount.

Appeal by defendant from judgment of FALCONBRIDGE C.J. (1 O. W. R. 652) in favour of plaintiffs for \$7,825 in an action to recover a commission for purchasing for defendant from tobacco growers in Ontario, 2,000,270 pounds of tobacco.

E. S. Wigle, Windsor, for defendant.

J. W. Hanna, Windsor, for plaintiffs.

THE COURT (BOYD, C., and FERGUSON, J.) held that there should be some deduction for the crop not up to the

fact standard, and, making this deduction, the yield
 and be fixed at 700,000 pounds, and 30 per cent. deducted.
 ment reduced to \$4,900 and costs. No costs of appeal.

FWRIGHT, MASTER.

MAY 12TH, 1903.

.CHAMBERS.

BUTT v. BUTT.

*—Change of—Slander—Justification—Preponderance of Con-
 venience—Costs of Trial.*

Motion by defendant to change venue from Goderich to
 wick, in an action of slander. The defendant justified
 words spoken, and alleged as particulars "that within
 months or thereabouts after the marriage of plaintiff
 r husband she gave birth to a child, she not having been
 ously married." Plaintiff laid the venue at Goderich,
 e she resided. Defendant lived at Windsor.

D. L. McCarthy, for defendant.

. A. Moss, for plaintiff.

THE MASTER.— . . . The present is a very unfortu-
 action. Such a charge made against any apparently
 etable woman is strongly to be deprecated, unless there
 me paramount duty cast upon the informant. . . .
 her from the affidavits that the charge against the plain-
 if true, is of something that happened at least 20 years
 and at a time when her residence was, as now, at the
 ship of Goderich. It may therefore not unreasonably
 ntended that any witnesses on the plea of justification
 d be found in that neighbourhood. . . . After
 g all consideration to the material, I am not able to
 "any such preponderance of convenience as is required
 e cases to be shewn:" Campbell v. Doherty, 18 P. R.
 244. . . . I think, moreover, that the character of
 ction itself forms an important element in the decision
 is motion. The charge admittedly made by defendant,
 aggravated by his plea of justification, is one that plain-
 ould not be expected to overlook. And I do not think
 defendant can expect to be in any way facilitated, or that
 tiff should in any way be hampered in the attempt to
 cate her good name.

The motion will, therefore, be dismissed; costs in cause
 aintiff; any extra costs occasioned to defendant by the
 being at Goderich are left to the consideration of the
 ge at the trial.

CARTWRIGHT, MASTER.

MAY 13TH, 1903.

CHAMBERS.

FULLER v. APPLETON.

Security for Costs—Several Defendants—Several Orders—Satisfaction by one Payment—Reservation of Right to Apply for Increased Security.

Motion by plaintiff for order directing that \$200 paid into Court by him be taken as a sufficient compliance with two orders for security for costs issued by the defendants, who appeared by two different solicitors.

J. B. O'Brien, for plaintiff.

A. C. Macdonell, for defendant Higbee.

Casey Wood, for the other defendants.

THE MASTER.—Defendants are prima facie justified in severing in their defences. From what appears in the affidavits and statement of claim it may well be that Higbee will claim indemnity from his co-defendants if plaintiff should succeed in his action. . . . I do not think that any other order can now be made (except with plaintiff's consent) than that which was made in *Edmunds v. Mabee*, 11 C. L. T. Occ. N. 177. . . . I have not found any case that adopts the view urged by defendants. No further security is usually given until the case is ripe for trial. . . . I only state the fact that generally \$200 is a sufficient security up to the commencement of the trial. The weighty observations of Meredith, J., in *Standard Mining Co. v. Seybold*, 5 O. L. R. at p. 13, must always be borne in mind. . . . If an application for increased security seems necessary, it will, no doubt, be made in due course. It will then be time enough to consider whether it should be granted and to what extent . . . and what disposition is to be made of the costs of such motion. The present order will be as asked for by plaintiff, and the costs of this application will be to plaintiff in the cause.

FERGUSON, J.

MAY 13TH, 1903.

TRIAL.

HOLT v. PERRY.

Executors—Specific Legacy—Right and Duty to Realize Security Specifically Bequeathed—Set-off of Statute-barred Debt Due by Legatee to Testator—Right of Retainer.

Marietta Gardner, who died 1st January, 1902, left a will whereby she made a gift to the plaintiff, her brother, in these

ls: "I give and bequeath absolutely unto my brother
 . a certain chattel mortgage for the sum of \$700
 . and I also give and bequeath absolutely unto my said
 ner . . . a certain claim I hold against my said
 ner for \$300." The next following clause in the will
 as follows: "I direct my executors to convert all the rest
 residue of my estate into cash, and, after payment as
 said of all my debts and funeral and testamentary ex-
 es, I dispose of the same as follows." Then followed
 ies and gifts.

Defendants were by the will appointed executors, and they
 upon themselves the burden of the trusts.

Defendants threatened to proceed to realize and get in the
 eys secured by the chattel mortgage, and this action was
 ight to restrain them from doing so. An interim in-
 ction was granted.

The action was tried at Toronto.

C. S. Neville, for plaintiff.

C. G. Graham, Brampton, for defendant.

FERGUSON, J.—It was scarcely contended that this gift
 aintiff is not a specific legacy. The contention, how-
 was that it is a pecuniary legacy as well. This I do
 understand, for, according to the argument, almost any
 fic legacy might be considered also pecuniary in kind
 character.

from a comparison of this gift with the cases collected in
 5th ed. of Theobald on Wills, at pp. 128-145, and some
 s referred to by counsel, and in the 9th ed. of Williams
 executors, p. 1030, I am clearly of the opinion that the
 in question is a specific legacy.

for plaintiff it was asserted and contended that there was
 eed of getting in the legacy, as the estate was clearly
 cient to answer the demands upon it. Even if this con-
 ation could be entertained at present, it is to be borne in
 . . that there is an action now pending against the
 e of the testatrix for the recovery of a large sum of
 y, and should that action succeed, the case would be
 ent.

Reference to Williams on Executors, 9th ed., p. 1303.]
 am of the opinion that the executors not only have au-
 ty and power to get in this legacy. but that it is their
 to do so, and have it in hand, and safe to answer the
 er purposes at the proper time. The getting in of the
 y in the present case must, I think, involve the collection
 e mortgage. Plaintiff has an interim order enjoining

defendants against doing this. This order must be dissolved and the perpetual order asked must be refused.

Defendants set up that, apart from the debt of \$300 from this legatee to the testatrix, mentioned in and forgiven by the will, there was another debt from him to her of \$2300. . . . This debt . . . was barred by the Statute of Limitations. The contention was that, although it could not be collected by action, yet it might be deducted from or set off against this legacy. See *Williams on Executors*, 9th ed., p. 1171. Defendants sought to have it declared that they had or would have the right to set off this debt of \$2300 and the interest upon it against this legacy; but I am not of this opinion. . . . "No case has been cited to show that there can be a right of retainer in respect of a debt owing from a specific legatee to the testator." In *re Akerman*, [1891] 1 Ch. at p. 218.

My conclusion then is, that there is not and cannot be a right of retainer or set-off of this old debt against this specific legacy. This opinion may be considered premature, but both counsel requested and in fact insisted upon me giving it.

This being my conclusion, it seems not necessary for me to consider the learned argument as to the interest on this old debt.

As each party set up a contention that failed, and as each of the contentions covered about the same amount of trouble and expense, I am of opinion that neither party should have any costs against the other party.

CARTWRIGHT, MASTER.

MAY 14TH, 1900.

CHAMBERS.

GOOCH v. ANDERSON.

Trial—Postponement—Absence of Necessary and Material Witnesses—Terms—Change of Venue—Costs.

Motion by defendant to postpone trial.

S. B. Woods, for defendant.

H. H. Shaver, for plaintiff.

THE MASTER.—The trial should come on at Toronto next week. So far as appears on the material and from the statements of counsel on the argument, I do not see very clearly how defendant's husband can be so "necessary and material" a witness that defendant cannot go to trial without him. He had nothing to do with plaintiff, though it would seem

defendant's affidavit that plaintiff's offer was submitted and approved of by him before her acceptance of same.

On the whole, I think the trial should be postponed, on the following terms.

If plaintiff does not wish to let the trial go over to the non-jury sitting at Toronto, which will probably come about the 14th September at latest, then defendant be ready for trial at the non-jury sittings to be held on the 16th of next month at Barrie, a place which cannot be convenient to either party, or at St. Catharines, if the parties so desire. The defendant to elect forthwith not later than 11 a.m. to-morrow.

I am the more inclined to do this . . . because the trial was ready last month, but was not tried owing to the absence of a Judge . . . and because in the present case plaintiff has the very unusual advantage of practically having no risk from defendant security for costs. . . . Costs should be paid by plaintiff in any event, as well as any extra costs occasioned by the change of venue.

MAY 15TH, 1903.

DIVISIONAL COURT.

HANDLER AND MASSEY (LIMITED) v. GRAND
TRUNK R. W. CO.

Issues—Joinder of—Two Defendants—Different Causes of Action—Sale of Goods—Claim against Vendee for Price—Claim against Carrier for Loss in Transit.

Appeal by defendant company from order of BRITTON, (ante 407), reversing order of Master in Chambers (ante 407), staying proceedings until plaintiffs elect which of the defendants they will proceed against, and dismissing the appeal against the other.

D. L. McCarthy, for defendant company.

C. A. Moss, for defendant Kerr.

W. A. Sadler, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., FERGUSON, J.) was delivered by

MEREDITH, C.J.—It is impossible to reconcile all the authorities upon this subject, but we think the practice laid down in the more recent cases is clear, and that the order of the Master was right and should not have been reversed. The authorities before *Smurthwaite v. Hannay*, [1894] A. C. 494, were

decided on a group of English Rules dealing not with causes of action, but with parties. Since that case all the decisions in England are in harmony, except perhaps *Kent Coal Exploration Co. v. Martin*, 16 Times L. R. 486. Collins, L.J., puts the matter very clearly in *Thompson v. London County Council*, [1899] 1 Q. B. 840, at p. 844. Two cases seem to be the other way, viz., *Honduras R. W. Co. v. Tucker*, 2 Ex. D. 301, and *Bennetts v. McIlwraith*, [1896] 2 Q. B. 464, but in each case there was but one cause of action, as is pointed out by Collins, L.J., in the *Thompson* case, at p. 845. We must interpret Rules 186 and 192 in the light of the authorities, and follow *Quigley v. Waterloo Mfg. Co.*, 1 O. L. R. 606, which proceeds upon the English cases. Here the causes of action against the two defendants are distinct, and they cannot be sued in the alternative. The appeal should be allowed and the order of the Master restored. In view of the conflict of decisions, there will be no costs either here or below.

MACTAVISH, Co. J.

MAY 16TH, 1903.

TRIAL.

BURR v. BULLOCK.

Deed—Conveyance of Land—Cutting down to Security—Bond to Reconvey.

Action for a declaration that a certain conveyance of land, absolute in form, was intended only as a security, and for redemption.

Trial at Cobourg before MACTAVISH, Co.J., sitting for FALCONBRIDGE, C.J.

R. C. Clute, K.C., and J. W. Gordon, Brighton, for plaintiff.

W. B. Northrup, K.C., for defendant.

MACTAVISH, Co.J.—The question for determination in this case is whether the transaction between plaintiff and defendant was a loan . . . or a sale . . . with a right to repurchase.

About the beginning of October, 1896, plaintiff was in financial difficulties and made application to defendant for a loan, offering as security a mortgage on the property in question. This security the defendant refused to accept, but, in order to save the expense of foreclosure proceedings in the event of default, defendant agreed to lend plaintiff the amount required, and to take as security for the repayment

loan an absolute conveyance of the land, giving plaintiff an antedated bond in the penal sum of \$1,000, conditional for the reconveyance of the lands on payment of \$550, with interest at 8 per cent., on 11th October 1896. The bond recites that the deed was "given for \$550 and interest thereon," etc.

Defendant has been in possession since the date of the conveyance, has made improvements thereon, has been in receipt of the rents and profits, and resists plaintiff's claim for redemption. . . .

Considering the conveyance and bond together as part of one transaction, and taking into consideration the evidence given at trial, the conclusion is irresistible that the transaction was a loan . . . and that the conveyance was given for the purpose of securing to defendant the return of the loan with interest.

Verdict for plaintiff as prayed with costs.

MACTAVISH, Co. J.

MAY 16TH, 1903.

TRIAL.

MATTHEWS v. WELLER.

Husband and Wife—Joint Liability—Evidence—Alternative Liability—Election.

Plaintiff's action against two defendants, husband and wife, to recover the balance of the price of lumber sold and delivered by defendant at Cobourg before MACTAVISH, Co.J., sitting for Chief Justice MONROE, C.J.

L. Payne, Brighton, for plaintiff.

B. Northrup, K.C., for defendants.

MACTAVISH, Co.J.—The only question to be determined is whether defendants are jointly liable to plaintiff for the amount of the claim sued for. The defendant Alice J. Weller does not dispute her liability.

There is not, in my opinion, any evidence to support a finding of joint liability of husband and wife. This case comes within the principle of the decision in *Davidson v. McLelland*, 32 O.R. 382.

Where there is an alternative liability, I think plaintiff has the right to accept the liability of the wife: *Morel v. West*, [1903] 1 K. B. 64.

Judgment for plaintiff against defendant Alice J. Weller in the usual form, with costs. Action as against defendant D'Arcy L. Weller dismissed with costs.

MACTAVISH, Co. J.

MAY 16TH, 1903.

TRIAL.

ANDERSON PRODUCE CO. v. NESBITT.

Foreign Judgment—Action on—Defence—Fraud—Evidence to Sustain.

Action upon a foreign judgment.

Trial at Cobourg before MACTAVISH, Co.J., sitting for FALCONBRIDGE, C.J.

I. F. Hellmuth, K.C., and D. W. Saunders, for plaintiffs.

W. B. Northrup, K.C., for defendant.

MACTAVISH, Co.J.—Defendant's contention is, that the judgment in question was obtained by the fraud of plaintiffs upon false evidence adduced in the County Court of Winnipeg on behalf of plaintiffs and by the fraudulent concealment from the Court of the true motive of the transaction between plaintiffs and defendant. . . . This would be an answer to the action: *Hollender v. Ffoulkes*, 26 O. R. 61; *Abouloff v. Oppenheimer*, 10 Q. B. D. 295; *Vadala v. Lawes*, 25 Q. B. D. 310. The evidence must be of that clear and convincing character that the conclusion from it is irresistible that the foreign Court was not merely mistaken, but was actually misled, by the fraud practised upon it, into pronouncing a wrong judgment.

The evidence adduced before me falls far short of this, and I must therefore find the issues in favour of plaintiffs.

Judgment for plaintiffs for amount claimed with costs.

THE MAYOR'S WEEKLY REPORTER.

(TO AND INCLUDING MAY 23RD, 1903.)

TORONTO, MAY 28, 1903.

No. 20.

RIGHT, MASTER.

MAY 18TH, 1903.

CHAMBERS.

THIBADEAU v. LINDSAY.

*Dismissal for Default of Delivery of Statement of Claim—
Time—Costs—Terms of Allowing Action to Proceed—
Judgment.*

on by defendant to dismiss the action for want of
on.

Tremcear, for defendant.

MacIntosh, for plaintiff.

MASTER.—The writ of summons was issued on the
day, and appearance was entered on the 9th. No
t of claim having been filed, this motion was
on the 14th April. This was about 5 days after the
n of the three months. The affidavit of defendant's
filed in support of the motion is dated the 11th April.
uld seem to shew that he was on the watch to take
e of any slip of the plaintiff's solicitor. . . . In
r part of February negotiations were had with a view
tlement, which did not result successfully. . . .
ntiff asks leave to amend the writ of summons by
claim in respect of a certain note for \$500 dated
rch, 1901, and interest thereon. The plaintiff's
states that he was not aware of the existence of this
he commencement of the present action.

certainly is a commendable practice that the solicitor
endant should call attention to the fact of plaintiff
any default before moving to dismiss as in the pre-
e. The omission so to do cannot fail to affect the
on of the costs.

L. O. W. R. NO. 20

Under all the facts of the case, plaintiff's solicitor might not unreasonably have supposed that defendant would certainly not do anything to speed the cause. . . .

Plaintiff is to have leave to amend his writ as desired and is to file and serve his statement of claim within seven days. . . . The costs of the motion will be to defendant in the cause, and fixed at \$4. If the parties, or either of them, really desire a speedy trial of the action, I will consider on the settling of the order what arrangement can be made for that purpose.

CARTWRIGHT, MASTER.

MAY 18TH, 1901.

CHAMBERS.

BAKER v. WELDON.

Venue—Motion to Change—County Court—Preponderance of Conviction—Expense—Fair Trial—Prejudice in County—Undertaking—Dispense with Jury—Affidavit—Solicitor—Scandal—Irrelevant—Costs.

Motion by defendants in this and four other actions for the County Court of Huron to change the venue from George Ross to Toronto.

George Ross, for defendants.

W. Proudfoot, K.C., for plaintiffs.

THE MASTER.—These actions all arise out of a matter which has been frequently before the Courts during the last 6 or 7 years. This was the plan devised by one Daly. He induced farmers throughout the county to sign agreements whereby, in consideration of his advertising their farms in a certain way, they gave him a lien on such farms to the amount of 2 per cent. of their stated value. Many, or perhaps all, of these agreements, have been assigned, and, as in the present cases, are now held by the assignees. . . . The plaintiffs in these five actions have taken proceedings to have the agreements set aside on the ground of fraud and misrepresentation.

The present motion, therefore, presents for consideration some points of difference from the ordinary case. In these present cases the defendants counterclaim for the 2 per cent. and for interest thereon, and also to have their alleged liens enforced by sale or foreclosure. It will, therefore, be convenient to consider the motion as if the position of the parties was exactly reversed, and then see if sufficient ground

own for an order to change the venue from Toronto (no doubt, the assignees would have laid it) to Goderich. Baker and his four fellow complainants reside in Goderich and Brussels (defendants) cannot object to this, as they have the advantage of being prima facie entitled to have their actions tried at Toronto. On such a motion the court would urge two objections: (1) that no preponderance of convenience was shewn such as is necessary under the circumstances. I do not refer to them, as they are to be found in Gregor's valuable and exhaustive article in 38 C. L. 33-460. (2) That a fair trial cannot be had in the county of Huron.

The question of convenience, as was said in one of the cases, is really one of expense. . . . I see that the return from Goderich to Toronto is \$6.75. Now, in these 5 cases taken together, I gather . . . that there are in all 15 and 20 witnesses whom the various plaintiffs will need for the trials of their respective actions. Putting these all together, their fares would amount to \$108. Then each of the witnesses must be allowed on the average 3 days each at \$20 which would be \$60 more, making in all \$168. The plaintiffs' witnesses in these actions would be practically the same. . . . It is manifest on the question of expense that there is a sufficient preponderance to decide the question in favour of Goderich.

Convenience, however, is not the only point for consideration. There is the more important objection urged by defendants, that a fair trial cannot be had in the county of Huron. This is based on two grounds: first, that a good deal of feeling has been aroused among the farmers and other residents of that county, and, second, that certain newspapers have published articles prejudicial to the claims of defendants. . . . See *McIntyre v. Patrick*, 5 P. R. 210, *Davis v. Murray*, 9 P. R. 464, and *Walker v. Brogden*, 17 C. B. N. S. 571, reversed.]

On an examination of the evidence on which this ground is based, it does not convince me of its existence in the present case. The articles referred to . . . were published three years ago, and are most unexpectedly mild—I almost say perfectly unobjectionable.

However, whatever effect might perhaps be due to such considerations is entirely counteracted by the offer of the plaintiffs to dispense with a jury. . . . I will therefore affirm the order that was made in *Davis v. Murray*, and direct

that, in the event of the plaintiffs in each of these cases consenting that the trial shall take place before a Judge without a jury, the motions to change the venue be dismissed with costs to plaintiffs in the cause. These costs I fix in each case at \$4 only. I do so to mark my disapproval of the affidavit of plaintiffs' solicitor, on two grounds. First, because it was laid down as long ago as *Hood v. Cronkrite*, 4 P. R. 279, by Draper, C.J., that affidavits on these motions should be made by the party, and not by his solicitor, who can speak only from his client's instructions. This case has been followed within the last year, as will be seen by reference to p. 443 of 38 C. L. J., already referred to. The other ground is the objectionable character of the affidavit. I do not think that a solicitor is warranted before the trial of an action in speaking of "this action as one of five all arising out of the same fraudulent conspiracy between the defendant and others for the purpose of extorting money out of the plaintiff and others by means of an agreement alleged by defendant to have been signed by plaintiff."

MAY 18TH, 1903.

DIVISIONAL COURT.

HEFFERNAN v. TOWN OF WALKERTON.

Municipal Corporations—By-law—Payment to Mayor—Procedure at Meeting of Council—Reference to Committee of Whole—Injunction—Discretion.

Appeal by plaintiff from judgment of BOYD, C., in the Weekly Court (ante 17), upon a motion to continue an interim injunction, turned by consent into a motion for judgment, dismissing the action, which was brought by a ratepayer to restrain defendant corporation from paying to defendant Cryderman, the mayor of the town, \$125 as remuneration for his services as mayor during the year 1902.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. E. Jones, for plaintiff.

A. Shaw, K.C., for defendants.

BRITTON, J.—The plaintiff has no merits in this case, and, applying the words of the statute giving jurisdiction as to injunctions, I do not think this a case in which "it is just or convenient" that an order for an injunction should be made.

The by-law which was challenged was as fully considered by the council, and by the same members, as if considered in

mittee of the whole. The money was on hand. The majority of the council of 1902 desired that this money should be paid. The action is defended, so it is evident that the council of 1903 does not sympathize with or concur in the plaintiff's action. The plaintiff, technically, has a right to bring an action, and he has done so, instead of moving to quash the by-law; but there is no evidence that the ratepayers, the persons mainly interested, are with the plaintiff, or are opposing to the proposed payment of the small sum mentioned to the mayor of 1902. The inference from the matter before us is rather the other way. Plaintiff is hostile to the late mayor, and he ought not to be allowed to thwart the will of the council merely because, by a slip, the council did not consider the by-law in committee of the whole but considered it as a council. If there can be a case in which it can be said that there is any discretionary power in the part of the Court or a Judge as to granting or refusing an injunction, this is such a case.

No doubt the majority of the council desired to recoup the mayor, to some extent, for his loss in law costs incurred by the action brought against him by plaintiff. This law was against the mayor for what he did as mayor in the best or supposed interest of the town. I see no objection to this course; but, unfortunately, the council did not comply with the by-law they had previously passed, in putting by-law No. 764 through its different stages. The plaintiff's position as a judgment debtor is in, and it shews him to be a shifty man, not candid or frank, and that he will never, in any way, avoid it, pay one penny of the judgment; and it shews to me perfectly clear upon the evidence that this action was not brought by him in the interest of the ratepayers, but purely as a personal matter, to prevent Cryderman recovering anything to reduce his loss.

As to discretion, see *Doherty v. Allman*, 3 App. Cas. 709. In this case, instead of the action and motion for judgment, plaintiff moved to quash the by-law, the Court might, in the exercise of its discretionary power, refuse to quash. See *Re Town and Township of South Norwich*, 19 A. R. 343, 21 A. R. 669.

In the exercise of our discretion, in the circumstances of this case, we should not allow the appeal.

ALCONBRIDGE, C.J.—I agree in the result of my brother's judgment. This appeal will, therefore, be dismissed with costs.

FREET, J., dissented, giving reasons in writing.

MAY 18TH, 1903.

C.A.

REX v. BULLOCK.

*Criminal Law—Leave to Appeal from Convictions—Two Prisoners
Tried together—Burglary.*

Motion by defendants for leave to appeal from the verdict and sentence recorded by the Judge of the County Court of Waterloo, who tried defendants, without a jury, upon a charge of breaking and entering a shop in the town of Galt and stealing tobacco, found them guilty, and sentenced them to 23 months' imprisonment. The complaint was that defendants should not have been tried together, but that the evidence against each should have been considered separately.

J. M. Godfrey, for defendants.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—Having regard to the cases of Regina v. McBerney, 3 Can. Crim. Cas. 339, and Rex v. Fry, 19 Cox C. C. 135, the Court is of opinion that leave to appeal ought to be granted in order that the propriety of the convictions of the prisoners, under the circumstances, may be discussed.

MAY 18TH, 1903.

C. A.

RE SAULT STE. MARIE PROVINCIAL ELECTION.

SMITH v. MISCAMPBELL.

Parliamentary Elections—Corrupt Practices — Bribery — Proof of Offences—Proof of Agency—Election Avoided for Corrupt Acts of Agent—Saving Clause.

Appeal by respondent from judgment of trial Judges (ante 174) voiding his election for bribery by agents.

W. Cassels, K.C., and E. Bristol, for appellant.

A. B. Aylesworth, K.C., and R. A. Grant, for petitioner.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, MACLAREN, JJ.A., MACMAHON, J.) was delivered by

MOSS, C.J.O.—In the result we are of opinion that the judgment of the rota Judges should be affirmed.

evidence amply sustains their findings in respect of charges that have been held proven. We do not deem necessary nor do we propose to review the evidence at any considerable length. There was, as there generally is in cases of this kind, a good deal of contradictory testimony from the principals concerned in the impeached transactions, and we must draw our own inferences, assisted of course by the impressions formed and conclusions arrived at by the rota Judges during the progress of the trial before them.

In regard to the Roy charges, the rota Judges, in spite of the difficulty they felt in accepting Roy as a truthful witness, came to the conclusion upon the whole testimony that the employment and payment were based upon a request for a vote and an understanding that he would vote for the defendant or abstain from voting altogether. It is urged that the finding is opposed to the direct testimony of Parent, and that the veracity the rota Judges expressed confidence. But it was not in a position to know all that transpired, and it is quite apparent that more did transpire than he was able to state. According to M. Morreault, he and Roy had been talking for some time before Parent came upon the scene. And Parent says that almost the first words he heard between Morreault and Roy were that Morreault offered Roy to work for him and offered him \$3 or \$4 a day, and that Roy's reply was, "I don't intend to sell my vote." Could he speak of his vote unless something had been said about it previously? Is it not likely that something had been said to make him think that his vote was being sought?

At this time Morreault had been sent up to Sault Ste. Marie from Montreal by the party—as the appellant said—to canvass in the election. He was aware that Roy was a voter in the district opposed to the appellant and that he was out of work. Is there any special reason had he for desiring to employ such a man to do work as his assistant?

The work to be done did not call for any great amount of skill or intelligence. One would have supposed that, if necessary, some person could have been found among the supporters of the appellant who could speak English and French and was capable of performing the light labour that Roy was asked to do.

If money was to be spent for such services, why spend it on a political opponent? Money was paid by Morreault to Roy under circumstances calling for explanation. The explanation offered is that it was paid for the services, but this

is not satisfactorily made out. On the contrary, the testimony leads to the conviction that there would have been no employment if Roy had not been an unfriendly voter.

We have not overlooked Roy's statement that he was asked for his vote in Parent's presence, nor the fact that in that respect he was contradicted by Parent. Beyond question there was talk about his vote when Parent was present. And in all the conviviality and talking that went on, Parent may easily have missed some of the conversation, or Roy may have confused something that occurred in Demers's place, before they met Parent, with what took place afterwards.

The rota Judges, while taking a lenient view of Morreault and of his own account of his doings, were yet unable to accept his denial of Roy's statement that Morreault asked him for his vote. And in that we concur.

As to the other charges, the case is even clearer. The payments to Delargey are clearly shewn. One is admitted by Morreault, and one other he scarcely denies. He can only say he doesn't remember it. It is true that he endeavours to explain the admitted payment by saying that it was made in order to get rid of an importunate tramp.

But it is singular that this man should have singled him out and insisted upon him giving him money, even following him to the railway station, repeating his demands. But the real reason for the payment is explained by the other testimony.

Delargey and D'Aigle, both voters, came to Morreault's committee room, and he was told by Roy that they wanted to be kept or supported until the election was over. Morreault directed Roy to take them to the committee room of Mr. Kearns, another supporter and agent of the appellant. Roy accompanied the two men to Kearns, and told him that he had been sent by Morreault with these two men, who wanted to be supported until the election was over. Kearns sent them back to Morreault, saying that whatever the latter did he had authority to do.

They returned to Morreault's, and he then told them to stay and they would be satisfied — he would give Roy the money to pay them. Kearns was present and heard Roy give this testimony, but he was not called to deny or explain his part in the transaction, and the rota Judges accepted Roy's version.

We think the promise and payments to Delargey and the promise to D'Aigle well established, and we concur in the rota Judges' findings.

In doing these acts Morreault was guilty of bribery under 159 (a), as having promised money or valuable consideration to these voters in order to induce them to vote, and as having paid money to one of them, first, in order to induce him to vote, and afterwards, on account of his having voted.

These men intimated in terms not misunderstood by Morreault that unless they were supported or kept until election they could not and would not remain at Sault Ste. Marie to record their votes. Morreault thereupon promised them that they would be satisfied,—that he would give Roy the money for them—and they said they would vote for the appellant. Afterwards, in pursuance of his promise, Morreault made the payments to Delargey which have been proved. It is clear that but for their promise to vote for the appellant under the promise nor the payments of money to them would have been made.

These, as well as the bribery of Roy, were corrupt practices, within the meaning of the Election Act, sufficient of themselves to avoid the election.

Several acts of bribery having been established, it lay upon the appellant to discharge the onus of satisfying the tribunal that, notwithstanding such acts, the election should not be avoided.

To effect that it is necessary that the Court should be convinced that these corrupt acts were not only of a trifling nature in themselves, but of such trifling nature and of such trifling extent that the result cannot have been affected, or reasonably supposed to be affected, by them, either alone or in connection with other illegal practices. There were several illegal practices not of a trifling nature which cannot be overlooked in considering whether the appellant has succeeded in discharging the onus.

It is not possible to say that the acts of bribery were of a trifling nature in themselves. They were committed under circumstances shewing deliberation and intent. In Roy's bargain with him was plainly designed not only to secure his vote, but also to gain the advantage to be derived from the apparent fact (which Morreault took good care to exploit) that here was a known former supporter of the Liberal side come over to the appellant's side and working for him. How is the extent or far reaching nature of this transaction to be estimated?

The importation of Morreault from Montreal, and his participation in this election contest in the manner in which

he has been shewn to have participated in it, are not satisfactorily accounted for. We can perceive no reason consistent only with the proper conduct of the election for the introduction of such outside agencies.

If, as alleged, he was merely engaged as a speaker or orator, he was not retained long in that capacity only. He was soon permitted to depart from that employment and to engage in an entirely different kind of election work. He was openly recognized as an agent in charge of a committee room, opened and carried on by him in the appellant's interest, and in which or in connection with which the corrupt acts were committed. There is evidence upon which the conclusion might well be reached that he was engaged, or at all events was allowed, to assume a position in which he could do acts of the very kind of which he has been found guilty.

The explanations attempted to be given as to the disposition he made of the moneys placed in his hands while engaged in the work of the contest, do not remove the impression that more than is accounted for may have been used in similar ways.

What has been shewn as to the appellant's part in the supply of these moneys increases his difficulties on this part of the case. His account of his dealings in regard to them, as gathered from his depositions, demonstrate an entire disregard for the plain directions of the Act. These moneys were not paid through his financial agent. No account of them was rendered to that gentleman, and they did not appear in his published statement. And, even after an exhaustive preliminary examination of the appellant, the facts with regard to the payment of the draft for \$100 of which Morreault received the proceeds, were not disclosed until in course of the trial they were admitted by the appellant's counsel. We do not suggest that the explanation finally given should not be accepted, but the difficulties which the petitioners encountered in tracing these payments emphasize the impropriety of the failure to observe the directions of the Act.

There was so much of illegality and irregularity in and connected with the payment of these funds, and in and connected with the employment and conduct of Morreault, in whose hands they were placed, that we are unable to see how the appellant could hope to convince the rota Judges that the election ought not to be avoided.

We entirely agree with the conclusion they have reached, that the acts of bribery proved and the illegal practices of

they received such vivid impressions in the course of
 l, made it impossible for them to give the respondent
 eft of the saving clause, sec. 172 of the Act.

appeal must be dismissed with costs.

MAY 18TH, 1903.

C. A.

UFFNER v. LEWIS.

*Gracities—Overpayment of Legatees under Judgment—Mistake
 —Repayment—Interest—Distribution.*

deal by plaintiffs the Uffners from an order of Moss,
 sitting for a Judge of the High Court, upon an appeal
 e report of the Master at Hamilton, in taking the
 s of the judgment directed by this Court, 27 A. R.
 he main questions were, whether the basis of distribu-
 ould be per stirpes, as held by Moss, C.J.O., or per
 and whether the overpaid legatees were chargeable
 erest on the amount directed to be repaid.

appeal was heard by OSLER, MACLENNAN, GARROW,

rcy Tate, Hamilton, for appellants.

W. Harcourt, for the infant children of Mary Evans.

J. Teetzel, K.C., and A. M. Lewis, Hamilton, for the
 Come.

F. Shepley, K.C., and W. Bell, Hamilton, for the
 rs.

ER, J.A.—I agree with the judgment of the Court
 s to the principle of distribution. . . . The ap-
 s remarkably well argued, if I may say so, on both
 and I have given the arguments presented by counsel
 ntion they deserve. I have also read the authorities,
 e important authorities, cited, and am satisfied that
 lt which has been arrived at as to the intention of the
 ascertainable from the language he has employed—
 s his will which is to be construed, not those dealt
 other cases—is not in conflict with any rule or prin-
 ablished by or deducible from those cases.

As to the liability of the executors Lewis and Morgan and the Boys' Home to pay interest on the amounts received or retained by them in excess of what they were entitled to under the will, I can see no just reason why they should not be ordered to pay interest thereon at least from the commencement of the action. (I think 9th November, 1895. Statement of claim bears date 21st April, 1896). The authorities . . . justify, if they do not imperatively require, at least that measure of relief. But I am of opinion that, under the peculiar circumstances of this case, they do not oblige us to penalize these defendants by adopting the severer course of charging them with interest from 1882 or 1883, or the date of the decree, or of the Master's report in the administration action.

To the extent I have mentioned, I would vary the judgment, and dismiss the appeal in other respects.

GARROW, J.A., concurred.

MACLENNAN, J.A., gave reasons in writing for agreeing as to the principle of distribution, and for dissenting as regards interest.

CARTWRIGHT, MASTER.

MAY 19TH, 1903.

CHAMBERS.

HARMAN v. WINDSOR WORLD CO.

Security for Costs—Libel—Newspaper—Criminal Charge—"Provincial Crime"—Election Act.

Motion by defendant Dickinson for an order for security for costs of an action for libel.

Ferguson (Denton, Dunn, and Boulton), for applicant.

F. A. Anglin, K.C., for plaintiff.

THE MASTER.—The action is for an alleged libel appearing in the issues of the 16th and 23rd days of January last of a newspaper called "The Essex County World," of which the Windsor World Company are alleged to be publishers, and of which defendant Dickinson is admittedly the editor. It is admitted that plaintiff is financially irresponsible. . . .

the statement of claim plaintiff charges that defendant by his articles imputed to plaintiff serious offences. The question is, are they criminal?

Myth v. Stephenson, 17 P. R. 374, referred to.]

I feel constrained to hold that the articles in question impute a criminal charge, having regard to R. S. O. ch. s. 159 and 188, sub-sec. 7. I think the decision in *Wason v. Wason*, 17 A. R. 221, shews that there is such a Provincial criminal law (if I may be allowed to use the word convenient, if not strictly accurate, expression). This I think, is supported by the decision of the Supreme Court of Canada in *Attorney-General for Canada v. Attorney-General for Ontario*, 23 S. C. R. 458, on the question of the taxing power. . . .

Such enactments of the Legislature of Ontario must, I think, be held to be included in the exception as to a "criminal charge" in R. S. O. ch. 38, sec. 10 (a). But, however that may be, and even if I am wrong in that opinion, it is clear that the words complained of are capable of the interpretation put upon them by the statement of claim, "that the plaintiff, having so corruptly and illegally received said moneys as aforesaid, had wrongfully converted the same to his own use." I am of opinion that this certainly involves a criminal charge.

The motion must, therefore, be dismissed with costs to the plaintiff in any event.

MAY 19TH, 1903.

C.A.

PILGRIM v. CUMMER.

Partnership—Offer of Partner to Sell Share to Co-partners—Acceptance—Specific Performance—Covenant—Restraint of Trade—Security.

Appeal by defendants from judgment of ROBERTSON, J. (1901 W. R. 531) in favour of plaintiff in an action for a partnership account.

The argument of the appeal was begun on the 18th May 1903 by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLENNAN, J.J.A.

J. P. Mabee, K.C., and G. C. Thomson, Hamilton, for appellants.

G. Lynch-Staunton, K.C., and E. H. Ambrose, Hamilton for plaintiff.

The argument was to have been concluded on the 19 May, but the parties agreed upon a settlement, and judgment was pronounced in terms thereof, amending the judgment below by requiring plaintiff to give security in the sum of \$500 for the due performance of his covenant not to carry on within 200 miles of Hamilton a business similar to that carried on by the partnership.

CARTWRIGHT, MASTER.

MAY 20TH, 1903.

CHAMBERS.

MURPHY v. LAKE ERIE AND DETROIT RIVER
R. W. CO.

Discovery—Affidavit on Production—Better Affidavit—Second Order

On 25th February, 1903, an order was made by WILSON CHESTER, Master, directing defendants to file a further and better affidavit on production, and directing Alexander Leslie, an officer of defendants, to answer certain questions on his adjourned examination for discovery.

The plaintiffs now moved for a yet further and better affidavit on production from the defendants.

F. A. Anglin, K.C., for plaintiffs.

W. H. Blake, K.C., for defendants.

THE MASTER.—From Mr. Murphy's affidavit it appeared that on the 1st May he and his solicitor attended at the audience office of defendants, by arrangement with their solicitor, to inspect the documents mentioned in paragraphs 4 and 5 of the further affidavit of Mr. Leslie, he being also present, but not his solicitor. Mr. Leslie and Mr. McKay, another of the officials of the defendants, stated that, under instructions from defendants' solicitors, they declined to produce certain books and other documents called for by plaintiff.

[Reference to *Bedell v. Ryckman*, ante 280; *Evans v. Jaffray*, 3 O. L. R. 341; *Compagnie Financiere v. Peruvian Guano Co.*, 11 Q. B. D. 55; *Marriott v. Chamberlain*, 17 Q. B. D. 55.]

54; Storey v. Lord Lennox, 1 Keen 341; Lyell v. [unclear], 27 Ch. D. 20; Lavery v. Wolfe, 10 P. R. 488.]

obliged, with great reluctance, to make the order. No costs.

RIGHT, MASTER.

MAY 21ST, 1903.

CHAMBERS.

LEMON v. LEMON.

—Irregularity—Striking out—Mortgage Action—Change of Venue—Speedy Trial—Consolidation of Actions—Conduct of Consolidated Actions.

than Lemon died 17th December, 1902. By his will he bequeathed to his son Philip certain land for life, charged with a legacy of \$1,200 to the testator's son Joseph and \$400 to his daughter. Both legacies to be paid within one year after testator's death.

Testator appointed his two sons Philip and Joseph executors and trustees of his will. Letters probate issued on the 27th February, 1903.

On the 18th February, 1903, Joseph began an action against Philip to compel the latter to execute and deliver to him a discharge of a certain mortgage for \$1,500 made by Philip and another on 21st December, 1888, which had been assigned to Philip. This action was not proceeded with until the 19th May, when a statement of claim was delivered.

On the 17th April, 1903, Philip began an action against Joseph to enforce the mortgage by sale.

Prothonotary notice having been filed by Joseph in Philip's action, Philip moved to strike it out, and to change the venue of the action to Lindsay so as to have a speedy trial.

Philip made a motion for the consolidation of the two actions.

E. Middleton, for Philip.

W. McCullough, for Joseph.

THE MASTER.—On the question of striking out the jury verdict, I have no doubt. Pawson v. Merchants Bank, 11 P. R. 488. I decided that point, and by the Rules as they now stand the principle of that decision has even a wider application than it had at that time.

The next point for consideration is the propriety of changing the venue. This was in the statement of claim laid in Toronto, as was necessary under Rule 529 (b). The application is now made under sub-sec. (d). In the first case decided on this Rule, *Pollard v. Wright*, 16 P. R. 505, it was laid down by a Divisional Court that a "very strong case" must be made out to obtain a change. Has this been done in the present case?

I am of opinion that the motion should prevail, on the ground that Philip is entitled to have it decided promptly whether he is to get the money from his brother to pay the legacies charged on the farm of which he is a life tenant or whether he must make other arrangements. Had Joseph proceeded promptly with his action, the case could easily have been tried here before this time. In *Servos v. Servos*, 11 P. R. 135, the Chancellor held that speeding the trial was an important consideration. The motion here is to change the venue to Lindsay. This is opposed by Mr. McCullough on the ground that he has to be at Woodstock with one of the witnesses necessary in this case at the very time fixed for the Lindsay sittings. . . . Mr. Middleton declared his willingness to go to Woodstock, and to allow any extra expense thereby imposed on Mr. McCullough's client to be paid to him in any event.

The actions must undoubtedly be consolidated, and I think that Philip must have the conduct of the consolidated action or that Joseph's action must be stayed. I consider that Joseph has, so to say, lost his priority by laches and delay, and it is also to be borne in mind that Philip is more interested in prosecuting the action with diligence than his brother can be. . . .

[*Girvin v. Burke*, 13 P. R. 216, distinguished.]

The order, therefore, will provide that Joseph's action be stayed or consolidated with Philip's; that Philip is to have the conduct of such action; that the jury notice be struck out, and the case set down for the non-jury sittings at Lindsay or Woodstock, as Mr. McCullough may elect. . . . The order will embody Mr. Middleton's undertaking. The costs of these motions will be in the cause.

N, J.

APRIL 16TH, 1903.

WEEKLY COURT.

SMALL v. HYTTENRAUCH.

—Representation—Members of Trade Union—Rule 200.

on by plaintiff for an order under Rule 200 authorizing directing several defendants who were members of London Musical Protective Association to defend the action on behalf of all the other members of the association, who were not parties; also for an order authorizing and directing certain other individual defendants, members of the London Federation of Musicians, to defend the action on behalf of all other members of that association who were not parties and directing that, in each case, those so represented be bound by any judgment rendered, in the same manner and to the same extent as if they were personally parties to the action.

action was for an injunction to restrain the doing of or pursuing any course of conduct with a view to the removal of one Creswell and the members of his orchestra, employed by plaintiff, to refuse to continue in plaintiff's employment, to break their contracts with plaintiff; and to restrain the defendants from conspiring together for the said purpose with the purpose of forcing plaintiff to break his contract with said Creswell and his orchestra; and for damages and costs and malicious conspiracy.

J. Moss, for plaintiff.

O'Donoghue, for certain defendants.

USON, J., refused the motion with costs, following *Don v. Russell*, [1893] 1 Q. B. 435.

EN, J.A.

MAY 14TH, 1903.

WEEKLY COURT.

CRESWELL v. HYTTENRAUCH.

—Representation—Members of Trade Union—Rule 200.

on by plaintiff under Rule 200 for an order as in *Hyttentrauch*, ante.

action was brought by a member of a trade union for an injunction to restrain the pretended dissolution of the

union, and the taking of any steps or proceedings to substitute a pretended new charter and association for the charter and association of the said union, in fraud of the plaintiff's rights as a member of such union, and from conspiring in any other way to exclude plaintiff from membership in the union.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for certain defendants.

MACLAREN, J.A. (sitting as a Judge of the High Court), dismissed the motion with costs, following the decision of Ferguson, J., in *Small v. Hyttenrauch*, ante.

MARCH 4TH, 1903.

DIVISIONAL COURT.

HUNSBERRY v. KRATZ.

Attachment of Debts—Interest of Debtor in Estate—Residuary Legatee under Will.

Appeal by the garnishees, the executors of the will of Anna Wismer, from an order of the Judge of the County Court of Lincoln in a garnishing plaint in the 2nd Division Court in that county, dismissing an application by the garnishees for a new trial after a judgment for the plaintiff as against the garnishees.

H. H. Collier, K.C., for appellants.

J. A. Keyes, St. Catharines, for primary creditor.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that the interest of the primary debtor as residuary legatee under the will of a testator who died within a year before the attachment, was not such a debt as could be attached.

Appeal allowed with costs, and garnishees discharged.

CARTWRIGHT, MASTER.

MAY 23RD, 1903.

CHAMBERS.

FULLER v. APPLETON.

Security for Costs—Increased Security—Premature Application—Leave to Renew.

Motion by defendant Higbee for an order to compel plaintiff to give further security for costs.

A. C. Macdonell, for applicant.

Casey Wood, for the other defendants.

J. B. O'Brian, for plaintiff.

THE MASTER.—Considering that plaintiff has already
to Court \$200, which on motion was allowed (on the
st.) to stand as a compliance with the two præcipe
for security issued by the applicant and the other de-
s (see ante 424), I think this motion is entirely pre-
and unwarranted. I have had occasion to consider
atter fully in *Burnside v. Eaton*, ante 412. The con-
there reached was, that the party applying must not
anxious to secure himself. It will be time enough to
r the question of witness fees and commissions and
g eminent counsel, when the action is at issue. Mr.
ell asked me to retain the motion if I thought I could
nt it. But I do not see any ground for so doing. The
must be dismissed with costs to plaintiff and the other
nts in any event. If it really becomes necessary, the
may be renewed on proper material and at a suitable
the action.

MAY 23RD, 1903.

DIVISIONAL COURT.

CRAIG v. SHAW.

*Goods — Action for Price — Contract — Place of Delivery —
Inspection—Defect in Quality—Allowance for.*

deal by defendants from judgment of HARDING, Co.J.
ria, sitting at the trial for a Judge of the High Court,
r of plaintiffs in an action to recover \$487, the price
ords of bark sold by plaintiffs to defendants. The
ave judgment for the full amount claimed.

appeal was heard by FALCONBRIDGE, C.J., BRITTON,

Hodgins, K.C., for defendants, contended that there
as a complete contract of bargain and sale, or, if any,
extended only to a part of the whole amount claimed;
endants acted only as agents for plaintiffs in selling
; and that the bark delivered was not merchantable.

McLaughlin, K.C., for plaintiffs, contra.

FALCONBRIDGE, C.J.—I agree in the conclusion that
s a binding contract for all the bark, the validity of
contract did not depend on the execution of a more
ocument.

The plaintiffs' contract was, therefore, to deliver the bark at Graham's siding, and the inspection ought prima facie to have taken place there, and nothing happened to change the place of inspection to London.

It follows that the defect in quality forms no ground of defence in this action (*Towers v. Dominion Iron and Metal Co.*, 11 A. R. 315), and the only redress of defendants would be by cross-action.

But the learned Judge has, although there is no pleading by way of counterclaim, made an allowance or deduction which seems to be justified by the evidence, as are his other findings in the case. . . .

The appeal will be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

THE MAYOR'S WEEKLY REPORTER.

(TO AND INCLUDING MAY 30TH, 1903.)

TORONTO, JUNE 4, 1903.

No. 21.

S, JUN. CO.J.

MAY 20TH, 1903.

TH DIVISION COURT LEEDS AND GRENVILLE.

ESON V. BASTARD SCHOOL TRUSTEES.

*Tools — Contract with Teacher — Execution by Trustees —
ty for Meeting—" Continuation Class"—Appropriation of
nt—Former Contract Continuing—Computation of Salary
of Absence.*

nt by Samuel Acheson against the board of public
stees for school section No. 11 of the township of
The plaintiff's claim was for balance of salary as
nder a contract with the defendants dated 14th
, 1901. The following were the particulars:

Salary from 2nd Jan. to 29th Aug., 1902..	\$277 25
"Continuation grant," as per contract....	30 00
Amount payable under R. S. O. ch. 292, sec. 7, sub-sec. 6, to 4th Nov.....	102 24
Amount payable under same statute to date of issue of summons	34 08
	<hr/>
	\$443 57
on account	289 97
	<hr/>
	\$153 60

laint was tried at Delta on 13th May, 1903.

m Wyld, Ottawa, for plaintiff.

Brown, Brockville, for defendants, contended that
ment sued on, being the second agreement between
nd defendants, not having been signed at a meeting

of the trustees regularly called, but being signed by the individual trustees upon being called upon at their houses for that purpose, was not binding: *Lambier v. South Cayuse School Trustees*, 7 A. R. 506.

REYNOLDS, JUN.CO.J.—In this case I find that there was no meeting of the trustees, as required by sec. 20, so as to make the re-engagement of, or second agreement with, the plaintiff binding on the defendants; consequently plaintiff cannot sue on that agreement.

There is, however, little practical difference, inasmuch as I hold that plaintiff would only have been entitled to the proportion of the grant in respect of the continuation clause applicable to the period from January to June, 1902, and the \$17.04 paid by the defendants would amply pay this.

I further find that this sum of \$17.04, being expressly paid (as per Alex. Stevens's letter of 29th October, 1902) for his continuation work, cannot now be taken into account. It could not be recovered back by the defendants or now applied by them to any other indebtedness to the plaintiff.

I further find as a fact that plaintiff was engaged by the defendants, as per agreement of 14th January, 1901, at a salary of \$450 per annum, and, the second agreement not being binding, this old agreement continues (*McPerson v. Usborn School Trustees*, 1 O. L. R. 261), and the parties' rights must be determined by that.

I further find that plaintiff taught during the period from 1st January, 1902, to end of August, 1902, when his services ended, pursuant to his notice on 29th August, the last teaching day in August, which termination defendant fully assented to.

I find that this period embraced 131 teaching days (see Education Department circular, form 94). Plaintiff claims to be paid for 130 of these days; defendants say he is entitled to be paid for only 128 of these days, and they have paid him for that number.

Respecting these days in dispute, I find as follows: One day was an election day, when plaintiff was absent with the consent of the trustees, but at his own cost and charges. This day plaintiff does not claim. The two days in dispute arise as follows: The entrance examination for High School purposes was held in the spring (probably June) of 1902, at the Delta school house. This was appointed by the department and the inspector. I presume by recommendation of the county council under 1 Edw. VII. ch. 40, sec. 411.

a consequence of this the Delta school was closed during the days of this entrance examination—a number of the plaintiff's pupils wrote on this examination.

The inspector appointed the plaintiff to go to another school, viz., that at Newborough, and preside at the entrance examination there. Consequently plaintiff was not teaching during the days of the examination. The examination lasted three days. Defendants have only deducted two days, probably because the third day was a Saturday.

Under the usual method of computing (sec. 81 (4) of Act), the plaintiff's salary for these two days would amount to \$4.27.

The plaintiff did not notify defendants that school would be closed on these days. Stevens, one of the defendants, says that had they been notified another room suitable for the school, or for holding the entrance examination, could have been provided without any additional expense to defendants. There is no evidence before me that such a course is ever adopted, and, in view of the fact that the inspector, who understands such matters best, sent the plaintiff to Newborough, and of the number of plaintiff's own pupils who were writing on this entrance examination, and the disorganization which would naturally follow, I do not think such a course would have been adopted by the trustees, even if plaintiff had formally notified them of the fact of the examination, and requested instructions.

From the evidence I hold that defendants are not entitled to treat these two days as being days on which plaintiff was absent from their services and his duties, and that plaintiff is entitled to be paid for them, and in view of the way the case has been presented before me, and the way teaching is paid when absent on sick leave, I find he is entitled to be paid for them.

The calculation be made the other way, viz., by deducting these days from the total teaching days of the year, there would still be a sum of money coming to the plaintiff.

I find, therefore, that the plaintiff is entitled to recover his salary, and as plaintiff's salary was not paid in full at the time of his agreement, he is entitled under the statute to be paid over at the rate in the agreement till suit brought. The rate in the agreement being \$2.13 per day, and there being 59 teaching days from 29th August to 22nd November, date of summons, he is entitled to \$125.67 additional, making a total of \$129.94.

The plaintiff, as before intimated, is not entitled to any more in respect of the continuation class.

A direct judgment to be entered for \$129.94, and costs to be paid in 15 days.

CARTWRIGHT, MASTER.

MAY 26TH, 1903.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. EARHEART.

Summary Judgment—Mortgage—Defence—Release—Conveyance—Question to be Tried.

Motion by plaintiffs for summary judgment under Rule 603.

F. J. Dunbar, for plaintiffs.

H. R. Frost, for defendant.

THE MASTER.—By deed dated 1st June, 1893, defendant mortgaged to plaintiffs certain real estate securing \$700 and interest. On 19th June, 1902, interest was in arrear, amounting to \$166.89. On 26th May, 1902, defendant signed an offer to purchase the land from the liquidator of plaintiffs for \$600. The offer is now before me. Annexed to it is the recommendation of the acceptance of such offer by the liquidator . . . stating that the claim of the company is \$1,015; that the land is valued . . . at \$600; and that Mr. Earheart now offers \$600 cash. It is admitted that the offer was accepted and the land was conveyed to a nominee of defendant, who had advanced the \$600, which was duly paid to the liquidator. . . . On 21st October last an action was commenced in a County Court to recover from defendant the balance still alleged by plaintiffs to be due on the mortgage. An appearance being entered, a motion was made for summary judgment. On consent of all parties on 7th March last an order was made transferring the action to the High Court; and on 19th May this motion was made for summary judgment. . . .

Defendant's solicitor states as his ground of defence that when the sale of the lands was made to him, he fully understood that upon payment of \$600 plaintiffs would have no further claims upon him in reference to the mortgage.

If this proves to have been a mistake on his part, it was certainly a very natural mistake.

In *Jacobs v. Booth's Distillery Co.*, 85 T. L. R. 262, the true principle was declared to be this: "Judgment should only be ordered where, assuming all the facts in favour of defendant, they do not amount to a defence in law."

Applying this test to the facts of the present case, it is clear that the motion must be refused. Looking at the whole transaction and the documentary evidence, it may yet be held that plaintiffs have no further claim on defendant. . . .

The motion is refused, and, as this same point was taken defendant on the motion in the County Court, I make the same to him in any event. I do not see how plaintiffs could be expected to succeed. See Warner v. Bowlby, 9 Times R. 13.

RTWRIGHT, MASTER.

MAY 26TH, 1903.

CHAMBERS.

MCDONALD v. PARK.

Joinder of Causes of Action—Action to Set aside Will and Establish Earlier Will—Different Beneficiaries—Inconvenience—Jurisdiction of High Court.

Motion by defendants other than George McDonald and infants to strike out paragraph 4 of statement of claim and make other necessary excisions, on the grounds of (1) improper joinder of separate and distinct causes of action, and (2) that the cause of action set up in paragraph 4 could not properly be tried in this Court.

W. E. Middleton, for applicants.

C. A. Moss, for defendant George McDonald, supported motion.

The infants were not represented.

Casey Wood, for plaintiff, shewed cause.

THE MASTER.—I think the motion should succeed. . . . This is an action to set aside a will of plaintiff's mother (which was admitted to probate on 3rd January, 1903,) on the ground of want of testamentary capacity on the part of the testatrix at the date of its execution in November, 1902. Of this will the defendants Duncan and Ireland are executors, and the infants take nothing under it.

The paragraph of the statement of claim which is sought to be expunged sets out a prior will, alleging same to be the true will and testament of the testatrix, and paragraph 5 of the prayer for relief asks a declaration of the Court to that effect. Of that will the plaintiff and his father, the defendants George McDonald, were named executors. The infant defendants and any subsequent issue of the defendant Ann Park were devisees under this earlier will.

From this it appears that there are two separate causes of action: (1) to set aside the will of November, 1902, of which probate has already been granted; (2) to establish the will of October, 1898, as the true last will of the testatrix. There

are also two distinct sets of defendants. On the first branch the infants are not properly parties. On the second branch the executors are not necessary parties. It appears to me that this cannot be done. As I understand the cases, you cannot join separate causes of action against separate sets of defendants. You may join separate causes of action against the same defendants; or you may join (in some cases) separate defendants where there is only one cause of action.

The latest case on the point (*Chandler and Massey, Limited, v. Grand Trunk R. W. Co.*, decided on 15th May instant) is to be found in 2 O. W. R. 427. There, in giving the decision of a Divisional Court, Sir W. R. Meredith, C.J., said: "Collins, L.J., puts the matter very clearly in *Thompson v. London County Council*, [1899] 1 Q. B. at p. 844. . . . We must interpret Rules 186 and 192 in the light of the authorities, and follow *Quigley v. Waterloo Mfg. Co.*, 1 O. L. R. 606, which proceeds upon the English cases. Here the causes of action against the two defendants are distinct, and they cannot be sued in the alternative." This is sufficient to dispose of the motion.

But I think it well to point out that the second ground of action could not be "conveniently disposed of in the same action with the first." If the two grounds were allowed in one action, the defendants might, by way of counterclaim, set up a later will than that of October, 1898, which might make it necessary to call in other defendants than those already before the Court. And these in their turn might set up another will or codicil still later. The state of the record in such a case would be indeed astonishing.

But, even as now constituted, it is impossible to see what advantage can result from the objectionable paragraph. Until the will admitted to probate has been finally set aside, it would be idle to attempt to establish another. And a final determination of the first point might not be reached for some years—or conceivably the evidence given at the trial might shew that as early as October, 1898, the necessary testamentary capacity was wanting. Again, if the will of November, 1902, was set aside, the will of October, 1898, if no later was proved, would be *prima facie* valid. Then the defendants would become the real plaintiffs in that issue, and the plaintiff would be the defendant. It is inconceivable that both issues could be tried at the same time. One would have to be postponed. These considerations seem to shew that the two causes of action could not conveniently be tried together, and therefore cannot conveniently be joined. The

is well understood that this question of convenience is an important factor in determining the application even of apparently unlimited power given to a plaintiff by Rule 232 to join several causes of action: see remarks of Lord Esher in *Burstall v. Beyfus*, 26 Ch. D. 39 (H. & L. p. 411), and this Rule (232) authorizes the joinder not of several actions against distinct persons, but several causes of action.

The foregoing makes it unnecessary to consider the second ground of objection set out in the notice of motion. I will say that, so far as I can learn, no case can be found in which a plaintiff has come direct to the High Court to establish a will, there being neither probate granted of any other will nor any proceedings pending in a Surrogate Court in respect of another will. The language of sec. 38 of the Judicature Act seems to contemplate an attack by the plaintiff on an attempt to have a will declared void, not established. The cases cited by Mr. Wood seem to be all of this character. *Wright v. Cameron*, 10 P. R. 572, is not on this point at all. *Appleman v. Appleman*, 12 P. R. 138, all that was decided was that a defendant contesting the validity of the will proved in the Surrogate Court might by way of counter-plea propound two earlier wills under which he claimed in preference of the last in date being invalidated.

But, however this may be, the motion must be allowed on other ground. The costs will be to the defendants in the

I may add that a further consideration of the judgment of the Chancellor in *Quigley v. Waterloo Mfg. Co.* makes it quite clear to my mind that the present is not a case in which the principle of *Child v. Stenning*, 5 Ch. D. 695, and similar cases can apply.

WRIGHT. MASTER.

MAY 26TH, 1903.

CHAMBERS.

MORLEY v. CANADA WOOLLEN MILLS CO.

Statement of Claim—Enlargement of Claim made by Writ of Habeas Corpus—Wrongful Dismissal of Servant—Introductory Statements—Appreciation in Stock of Company—Representations—Particulars.

Motion by defendants to strike out the 2nd, 7th, and 8th paragraphs of the statement of claim, because they tend to mislead, embarrass, and delay the fair trial of the action,

and are irrelevant to the issues, or in the alternative for particulars.

H. Cassels, K.C., for defendants.

C. A. Moss, for plaintiff.

THE MASTER.—The action is for alleged “wrongful dismissal” as indorsed on the writ. This claim is enlarged in the statement of claim by setting up in the 7th paragraph that owing to plaintiff’s alleged wrong the value of certain shares of the defendant company owned by him, and for which he paid \$5,200, has been largely impaired. It is further enlarged by setting up in the 8th paragraph that, since the plaintiff’s dismissal, the defendants have asserted that his resignation was demanded on the ground of incompetence whereby the defendants have largely injured the plaintiff in his business reputation.

The 2nd paragraph, as I understand it, is not necessarily objectionable. It is perhaps merely introductory, and might have been joined to the 3rd. The 2nd paragraph does not make any distinct complaint against the defendant company. It indicates probably the opening of the plaintiff’s evidence at the trial. I do not see how it can be prejudicial or embarrassing in that view.

Of the 7th paragraph I take a less favourable view. Between the alleged wrongful dismissal of the plaintiff and the depreciation of his shares there is no apparent connection and none is suggested. There is no allegation, e.g., that since the plaintiff’s dismissal the shares, if offered for sale, have depreciated in the market, and that this depreciation was in any way caused by such dismissal. If the plaintiff really means to urge this as a substantial ground of damage, the defendants are entitled to have the matter made clear either by amendment or by particulars which, as was said by Vaughan Williams, L.J., in *Millbank v. Millbank*, [1900] Ch. at p. 385, is another way of expressing the same thing.

The 8th paragraph, it was admitted by Mr. Cassels, “might be made into a cause of action.” I think it does already set up a cause in respect of which the plaintiff would be entitled to recover on same being proved. The complaint is of “injury to the plaintiff in his business reputation.” The defendants are, however, entitled to have such particulars of the alleged injurious statements as will enable them to shape their defence as they may think best. The matter at present is left wholly to conjecture.

I am not sure if the defendants complained of the statement of claim being unduly enlarged. But if so, I do not think it was, following *Smythe v. Martin*, 18 P. R. 227. In such a case such amendments would be allowed, as is shewn in *Hogaboom v. McCulloch*, 17 P. R. 377, and *Patterson v. Central Canada L. and S. Co.*, 17 P. R. 470. In *Sugarman v. Robinson*, 17 P. R. 419, at p 425, Sir W. R. Meredith, C.J., said (in a case not similar, though analogous) that, the plaintiff having stated that he could not at present state any particulars of certain injurious statements, he was entitled to leave to examine the defendant to enable him to furnish them.

In case I am wrong in the view I have taken of the 2nd paragraph, and if the plaintiff intends to make any claim in respect of the representations made to him before the incorporation of the defendant company, or in respect of the purchase of the \$5,200 stock, as having been induced by such representations, then full particulars should be given so as to enable the defendants to know what is being set up by this paragraph and to make such defence as they may be advised. The costs of this motion should be to the defendants in the cause.

—
JESSE, C.J.O.

MAY 26TH, 1903.

WEEKLY COURT.

MACDONELL v. WEST.

Petition—Petition under Partition Act—Parties—Execution Creditors of Co-parcener—Preservation of Lien—Registration of Certificate of Allowance of Petition—Failure to Renew Execution—Conveyance by Co-parcener to Bona Fide Purchaser—Priorities.

At the date of the filing of the petition for partition in, the Michigan Clothing Company were entitled to a general lien upon the undivided estate or interest of the defendant Charles A. Loughin in the lands described in the petition, by virtue of a writ of execution against goods and lands in the hands of the sheriff. And the petitioner made them parties defendants to the petition in respect of such lien.

The lien was still subsisting at the date of the allowance of the petition on the 14th June, 1899. Pursuant to sec. 29 of the Partition Act, a certificate of the allowance of the petition was registered in the registry office on the 16th June, 1900.

The Michigan Clothing Company's writ of execution, not having been renewed, expired in the sheriff's hands on the 25th February, 1900. By two conveyances dated the 24th April, 1900, and the 25th April, 1902, respectively, the defendants Charles A. Loughin and Martha A. Loughin, his wife, granted and conveyed all their estate and interest in the lands to one Mary E. Gamble.

An order for sale in lieu of partition of the lands was made on the 3rd December, 1901. On the 31st December 1901, they were sold to a purchaser, and subsequently the purchase moneys were paid into Court.

On the 20th May, 1902, an order was made adding Mary E. Gamble as a party to the proceedings with respect to any right, title, claim, or interest she might have in the proceeds of the sale. On the 9th June, 1902, the Michigan Clothing Company placed an alias *fi. fa.* in the sheriff's hands, and thereafter the local Master proceeded to ascertain the respective rights and equities of the parties.

The company claimed payment to them of the portion of the purchase moneys attributable to Charles A. Loughin's interest, and to be entitled thereto notwithstanding the conveyances to the defendant Mary E. Gamble. It was shewn that the company had not been paid the amount of their judgment debt, and that the failure to renew the *fi. fa.* was through oversight and inadvertence. On the other hand, the local Master found that the defendant Mary E. Gamble was a bona fide purchaser for value, and held her entitled to the moneys.

The company appealed from the report.

The question on the appeal was whether the filing of the petition, the order of allowance, and the registration of the certificate of allowance, operated to preserve the company's lien and rights against the lands, so as to dispense with renewal of the writ of *fi. fa.*

The appeal was heard by Moss, C.J.O., sitting for a Judge of the High Court.

W. M. Douglas, K.C., for the appellants.

Grayson Smith, for defendant Mary E. Gamble.

Moss, C.J.O.—The certificate of allowance of the petition is clearly "an instrument," within sec. 2 (1) of the Registry Act. It is a certificate of a proceeding in a Court, and under sec. 92 of the Act the registration thereof constituted notice to all persons claiming any interest in the lands subsequent to such registration.

f, therefore, the company's lien was preserved by the proceedings taken prior to her purchase, the defendant Mary Lamble was affected with notice of the lien at the time the conveyance to her.

It is proper, though not compulsory, in the first instance to make a person having a lien on the estate or any part thereof by decree, mortgage, or otherwise, a party to the proceedings. If a person having a lien on the undivided share of a person interested in the lands is made a party, his lien is confined to such share. But failure to make him a party in the first instance does not impair or affect his lien: sec. 21. In either case he is left to make proof of his claim at a subsequent stage. The exact effect of the allowance of the petition is not declared by the Act, but I think it clear that it has not the force of a judgment or order establishing the rights of any party. Upon the allowance the parties shall appear, and, by a concise statement of facts by way of defence, and further according to the practice of the Court, to show title as to the proportion which they or any of them have in the premises: secs. 31, 32. If none of the parties appears within 15 days next after service of the order of allowance of the petition, the petitioner shall be at liberty to proceed with judgment of partition and proceed as directed: sec. 34. When a sale is determined upon, inquiries and proceedings shall be directed for the purpose of ascertaining and settling the claims of creditors or persons having liens or incumbrances: secs. 44, 45, 46.

And this inquiry should extend not merely to the existence of liens at the date of the filing of the petition, but to the date when the reference is being proceeded with: *Robson v. Robson* (1884), 10 P. R. 324.

The allowance of the petition seems to operate to no other extent than to declare the regularity of the proceeding, to enable the petitioner to give notice of the lis pendens to the registration of the certificate, and to call upon the other parties to the petition to make answer if so advised. It does not, nor does registration thereof, determine anything as to the rights of the parties or dispense with proof of the title and claims against, the land.

In *Yale v. Tollerton* (1866), 2 Ch. Ch. 49, Vankoughnet, J., held that a judgment creditor, having obtained a decree in equity for equitable execution by sale of his debtor's interest in certain lands, while executions against lands were in the sheriff's hands, was not required to keep the

executions renewed in order to preserve his rights. This decision is said to have been affirmed by the full Court on rehearing. See *Wilson v. Proudfoot* (1868), 15 Gr. at p. 107. The reference to 13 Gr. 302 is incorrect. The decision of the full Court does not appear in Grant's reports or elsewhere that I can discover.

Vankoughnet, C., also held, in another case, that the filing of a bill in Chancery to enforce equitable execution of a judgment was equivalent to a seizure at law: *Ex relatione Mowat V.-C.*, in *Wilson v. Proudfoot*, *supra*. The facts are not shewn, but it must have been a case in which there could have been no execution of the *fi. fa.* by the sheriff.

In *Yale v. Tollerton* the interest sought to be made available by the execution creditor was such as could not be taken or sold by the sheriff under the writ of *fi. fa.*, and resort to equity was necessary in order to render it available.

That being so, there seemed no good reason, after a decree had been obtained, for continuing in the sheriff's hands a writ under which he could take no effectual proceeding. As much had been done to constitute an inception of a seizure under the *fi. fa.* as the nature of the case permitted. *Vide Dox Tiffany v. Miller* (1850), 6 U. C. R. 426; *Bradburn v. Hall* (1869), 16 Gr. 518.

It is important to note that the execution creditor not only instituted the proceedings—was the actor in them—but carried them to decree during the currency of the writ.

In the present case the Michigan Clothing Company were not the actors in instituting the partition proceedings. And they do not appear to have done anything towards establishing their claim in the proceedings until long after the expiry of the *fi. fa.*

During its currency they took no step to preserve their rights. They put in no answer or concise statement of facts shewing their claim under sec. 31 of the Act. When the order for sale was pronounced they had not proved their claim and their *fi. fa.* was spent. And until an order for partition or sale was obtained there was nothing to prevent the petitioner from dismissing the petition. The petitioner was *dominus litis*, and the proceedings had not attained the stage at which the company could prosecute them: *Handford v. Stone*, 2 S. & S. 196; *Taylor's Chancery Orders* (notes to Order 184), p. 210.

I think they were bound to keep alive the lien which they had at law, at least until there was some act or declaration

the Court recognizing their claim as an existing one against the lands. The lien which the writ of execution had created has gone before the proceedings had become effectual to preserve it, and in the meantime the rights of the defendant Mary E. Gamble as a bona fide purchaser intervened.

The appeal is dismissed with costs.

MARTWRIGHT, MASTER.

MAY 27TH, 1903.

CHAMBERS.

DIERLAMM v. TORONTO ROLLER BEARING CO.

Leading—Statement of Claim—Statement of Cause of Action—Sufficiency—Damages for not Transferring Stock—Principal and Agent.

Motion by defendant Henderson to strike out statement of claim as not disclosing any cause of action against him.

A. E. Hoskin, for the motion.

W. E. Middleton, for plaintiff.

THE MASTER.—In the 3rd paragraph there is a statement that the plaintiff "procured the defendant A. E. Henderson to be appointed attorney to execute the necessary transfers." The next paragraph alleges a receipt for the stock certificates signed by said defendant. The following paragraphs allege repeated requests to defendant to execute the necessary transfers so as to vest shares in the plaintiff, and his refusal to do so or to return the certificates to the plaintiff. The concluding paragraph alleges great loss resulting to the plaintiff from such neglect and refusal.

On such a motion as the present the truth of the allegations is to be assumed. So viewed they seem to me to set out a good cause of action, if hereafter supported by proof and not displaced by the defendant. He is charged by the plaintiff with having received the certificates in order, as attorney for the parties, to execute the transfers necessary to vest the shares of the defendant company in the plaintiff, and with a refusal either to execute the transfers or return the certificates, thereby causing serious loss to plaintiff.

The motion fails and should be dismissed with costs to the plaintiff in any event.

CARTWRIGHT, MASTER.

MAY 27TH, 1903.

CHAMBERS.

AHRENS v. TANNERS' ASSOCIATION.

Discovery—Examination of Officer of Defendant Association—Person Having Knowledge.

Some years ago fourteen of the principal tanners doing business in Canada constituted themselves a body called the Tanners' Association. Their object was to offer such inducements to purchasers of sole leather as would lead them to purchase exclusively from the members of the association. The management of this matter was given to Mr. D. A. Burns, as secretary of the association. The plaintiffs made all their purchases of sole leather from the Breithaupt Co. Becoming dissatisfied with the Tanners' Association, the plaintiffs on 26th February last began an action against "The Tanners' Association." The writ was addressed to all the present members of the association, and was served on Mr. D. A. Burns "as a person having the control or management of the partnership business carried on by the Tanners' Association." To this writ the Breithaupt Co. alone appeared, stating that they were "sued as the Tanners' Association." The statement of claim was served on the solicitors so appearing, and they duly filed a statement of defence for the Breithaupt Co., alleging, inter alia, that "D. A. Burns was only authorized to act for them in reference to the matters in dispute; that the plaintiffs were bound to furnish Mr. Burns with satisfactory evidence of any claim, but that they had not done so."

The cause being at issue, the plaintiffs' solicitors proposed to examine Mr. Burns. This the defendants declined to allow, offering to produce any officer of the Breithaupt Co. that the plaintiffs might select. The plaintiffs' solicitors pressed their right to examine Mr. Burns, and on the 22nd May instant moved for an order directing him to attend.

C. A. Moss, for the motion.

W. N. Tilley, for defendants, shewed cause.

THE MASTER.—Mr. Tilley cited Morrison v. Grand Trunk R. W. Co., 5 O. L. R. 38, 1 O. W. R. 180, 263, 758, laying stress on the point taken by the Court of the use that can be made of such depositions. But a perusal of the judgments in the case leads me to think that on the undisputed facts of this case Mr. Burns is examinable. He seems to me to be a very perfect illustration of the statement of Moss, C.J.O., in

O. L. R. at the foot of p. 42, that the apparent inclination is "to consider that the officer who from his position in the corporation's business would be the proper representative or mouthpiece of the corporation in respect of such business, is the proper officer to answer the interrogatories." See too the remarks on p. 43 (4th paragraph—first sentence especially).

The Breithaupt Co. (and they only) have appeared to the writ served on Mr. Burns. Their president, as stated in the affidavit of Mr. Ahrens, told him that "the association had authorized Mr. Burns, the secretary, to defend the action." It is submitted that if the Tanners' Association are to be looked at as the defendants, Mr. Burns is their only officer. If the Breithaupt Co. are (as they put themselves forward as being) for the purposes of this action, the Tanners' Association, then Mr. Burns is, for this branch of their business, the very officer to be examined. I refer also to *Schmidt v. Town of Berlin*, 16 P. R. 242, where Ferguson, J., held that the caretaker of a building owned by the defendant municipality was "an officer who would reasonably be supposed to have knowledge—if any person had knowledge upon the subject." I think the order should go, and with costs to the plaintiffs in any event.

MACMAHON, J.

MAY 27TH, 1903.

TRIAL.

VICTOR SPORTING GOODS CO. v. HAROLD A.
WILSON CO.

Patent for Invention—Infringement—Article Stamped "Patent Applied for"—Notice—Subsequent Patent.

Action for damages for infringement of a patent for a punching bag invented by plaintiff Whitney called "The Twentieth Century Punching Bag." The defendants, being aware of this bag being on the market, wrote to plaintiff company on 3rd April, 1901, asking them to ship one of their bags with platform to defendants at Toronto, and plaintiffs on the 11th April complied with the request. An application for a patent was sent by plaintiffs to the patent office at Ottawa on 7th March, 1901. The plaintiff Whitney said that on the platform sent to defendants there was a notice that a patent had been applied for. A patent was issued for the Dominion on the 21st January, 1902. Defendants admitted that they got a sample of the platform and examined it, but said they did not observe that a notice was stamped thereon

"patent applied for." Defendants got the bag and platform as a pattern from which to manufacture and sell in Canada.

J. W. Nesbitt, K.C., for plaintiffs.

E. Bayly, for defendants.

MACMAHON, J., held that what was stamped on the platform defendants were bound to take notice of, and they could not shield themselves from liability as infringers by saying that they did not observe that the notice was stamped upon the platform they received. There was no license given by plaintiffs to defendants to manufacture the articles, and plaintiffs were protected by the application which Whitney had made to the patent office in Canada: see *Fowell v. Chown*, 25 O. R. 71; *Hovey v. Stevens*, 2 Robb's Pat. Cas. 479; *Pier-son v. Eagle Screw Co.*, 3 Storey's Rep. 402; *Ridout on Patent Law*, p. 424.

Judgment for plaintiffs with costs for \$100 damages and for delivery up to plaintiffs to be destroyed of the 45 bags and platforms on hand.

CARTWRIGHT, MASTER.

MAY 28TH, 1903.

CHAMBERS.

CORNEIL v. IRWIN.

Venue—County Court Action—Obligation to Bring Action in Court of County where Parties Reside and Cause of Action Arose—Rules 529 (b), 1216, 1219..

Motion by defendant to change the venue from St. Thomas to London, and to have the action transferred from the County Court of Elgin to the County Court of Middlesex.

C. A. Moss, for the motion.

W. J. Tremear, for plaintiff.

THE MASTER.—The parties, it is admitted, all reside in the county of Middlesex, where the alleged cause of action also arose. It is also apparent from the affidavits that there is, to say the least, no such preponderance of convenience as would justify a change either way. The point taken by Mr. Moss is new. So far as I am aware, it has not been the subject of any judicial decision, viz., that Rule 529 (b) applies to actions in County Courts.

If this was an action in the High Court, the venue would have to be laid at or changed to the city of London, under the provisions of this Rule 529 (b). The argument then is, that Rule 1216 is imperative: "These Rules. and the practice

and procedure in actions in the High Court or Justice, shall apply and extend to actions in the County Courts." And that, under Rule 1219, in this case, the venue, if laid by the plaintiff at St. Thomas, would certainly be changed to London. The argument of Mr. Tremear was, that this construction of the Rules would oblige a plaintiff to bring his action in a County Court case in the Court of the county where the cause of action arose, if all the parties reside there, which he is not required to do in a High Court case; whereas in a County Court case he cannot bring his action in one county and lay the venue in another, as may be done in actions in the High Court.

To this the reply is made, that, if the combined effect of the three Rules already cited is to make this obligatory, the plaintiff in such a case must submit.

The origin of Rule 529 (b) was 58 Vict. ch. 13, sec. 21, which applied only to actions in the High Court of Justice. The only reported case on this section that I am aware of is *Hollard v. Wright*, 16 P. R. 505. There a Divisional Court giving judgment said: "The policy of the Legislature evidently was that the expense of the trial of an action should be borne by the county in which the cause of it arose and all parties resided." The language is as applicable to the County Courts as to the High Court of Justice.

After consideration, I am of opinion that the motion must succeed. In no other way can effect be given to Rule 1216. As I view that Rule, it makes Rule 529 (b) as fully applicable to County Court actions as to those in the High Court. Had the statute alone been in force, the result might have been different, as it is clear in the present case that there is no practical difference in the matter of convenience.

The order will go to change the venue to London.

As the point is new, the costs of the motion will be in the cause.

ARTWRIGHT, MASTER.

MAY 28TH, 1903.

CHAMBERS.

DREW v. TOWN OF FORT WILLIAM.

Venue—Change of—Preponderance of Convenience—Books of Municipality—View of Premises.

Motion by defendants to change the venue from Guelph to Port Arthur.

W. E. Middleton, for defendants.

C. A. Moss, for plaintiff.

THE MASTER.—The plaintiff states that he himself will be the only witness on his own behalf, and that he does not think the defendants can have any more. They, however, depose, through their solicitor, that several will be necessary, including some present and past officials of the municipality.

The real question is as to the true construction of secs. 17 and 18 of 55 Vict. ch. 70, which seem to be in conflict. Something may turn on the actual condition of the lands in question. It might be of some advantage for the Judge at the trial to have a view; and Fort William is almost a part of Port Arthur. It may also be found helpful, if not absolutely necessary, to refer to the books and other records of the municipality. The expense of the journey from Fort William and return to Guelph is put at \$70. In view of all these facts, I think a case of sufficient preponderance of convenience is made out to justify the change.

The costs of the motion are to be in the cause.

It will not be necessary for plaintiffs to give another notice of trial.

CARTWRIGHT, MASTER.

MAY 28TH, 1903.

CHAMBERS.

JOHNSTON v. LONDON AND PARIS EXCHANGE.

Security for Costs—Action for Penalties—Statute—Provision as to Consent of Attorney-General—Effect of Obtaining Consent—Unsubstantial Plaintiff—Common Informer—Rule 1200.

Motion by defendants Parker & Co. for an order requiring plaintiff to give security for costs of the action. The statement of claim alleged that the applicants had rendered themselves liable to penalties amounting to \$3,640 under the provisions of 63 Vict. ch. 24, sec. 151 (O.).

R. B. Beaumont, for applicants.

George Bell, for plaintiff.

THE MASTER.—The affidavit filed in support of the motion states that plaintiff is not possessed of property sufficient to answer the costs of the action if found liable therefor. This affidavit is not in any way denied.

The point raised in answer by Mr. Bell is new, so far as I am aware. The Act in question, by sec. 17, provides that no action shall be brought for penalties thereunder except by the Attorney-General or by some one who has first obtained his consent in writing. It is not denied that the consent of the Attorney-General has been given to the present

ntiff, and it was contended by Mr. Bell that this consent equivalent to an expression of opinion by the Attorney-General that the present action is in the public interest, and, therefore, no impediment should be placed in the way of plaintiff. He contended that this distinguished the present case from similar actions given by R. S. O. ch. 1, sec. 8, sec. 30, as to which there is no restraint. He contended that these latter Rule 1200 might reasonably be confined; in cases under this Act or the similar provisions of 61 ch. 19, sec. 8, the plaintiff is not simply a common innkeeper, but is the authorized agent of the Attorney-General, and can no more be required to give security than the Attorney-General himself, who, so far as I can see, would not be liable for costs if he failed in such an action . . . Rule 1200 would seem to limit the power of the Court to award costs against the Crown to proceedings on a petition of right. *The Attorney-General v. Toronto General Trusts Corporation*, ante 271—Ed.)

Mr. Beaumont argued that the language of Rule 1200 was not to be construed to express, and that there was nothing in ch. 24 of 63 Vict. to limit the Rule or prevent its application. He urged that it could not be inferred that the Attorney-General would allow an unsubstantial plaintiff to commence an action and deprive defendants of the benefits of the Rule invoked. . . . The matter is not wholly free from doubt; but, in view of the uniform practice under Rule 1200, and the absence of any limitation as to this in the Act in question, I think this action should succeed. The onus is, in my opinion, on the plaintiff to shew that the Rule does not apply to his case. I do not say that I think he has satisfied it. Perhaps, if the matter is carried further, he may be successful. The usual order will go; costs in the cause.

BEET, J.

MAY 28TH, 1903.

TRIAL.

DENISON v. TAYLOR.

of Goods—Warranty—Nature and Extent of Warranty—Correspondence—Breach—Defect in Article Supplied—Damages—Consequential Loss—Valueless Article Supplied—Measure of Damages—Whole Price Paid.

Action for damages for breach of warranty and for misrepresentations upon the sale by defendants to plaintiff of a safe door. Plaintiff was a private banker. He bought the door from defendants in September, 1902, and on the 11th of November, 1902, burglars destroyed the door and entered the

vault. Plaintiff claimed \$250 for the door, \$200 for property in the vault destroyed, and \$1,800 for money and valuables taken away.

I. F. Hellmuth, K.C., and Shirley Denison, for plaintiff.

W. Cassels, K.C., and W. H. Blake, K.C., for defendants.

STREET, J.—Plaintiff wrote defendants on 27th August 1902, upon notepaper headed “R. E. Denison, banker:” “Will you give me a rough estimate of what a burglar-proof door . . . will cost?” Defendants replied on 28th August: “We can build you a burglar-proof door of any size and description you wish. The cheapest door we now make is \$. . . No. 67, the outer door being 1 1-8 inches thick, entire surface protected with hardened drill-proof plates . . . Next better quality of door to this is one 1 1/2 inches thick, at \$400, and the next \$550.” In this letter they enclosed cuts from their sample book of three vault doors, Nos. 67, 68, 69; the two latter were called “fire and burglar-proof vault doors.” No. 67 was called “fire-proof vault door with chilled steel lining,” and the printed note below the cut read: “The above cut represents our vault doors suitable for post offices, court houses, insurance offices, etc., and are made with a lining of chilled steel covering the entire surface of outer door.”

The plaintiff replied to this: “Would No. 67 furnish fair protection against burglars? Kindly answer this before Tuesday.” The defendants replied on 2nd September, 1902, by telegram: “Letter just received. No. 67 door gives best fire and burglar-proof protection.” On 11th September the plaintiff wrote to defendants: “Please forward by first class post the vault door No. 67 referred to in our recent correspondence. And on the same day defendants accepted the order.

From the evidence I should come to the conclusion that the handle to the spindle by which the lock is turned had been knocked off, and dynamite had been introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave easy entrance to further explosives by which the door was wrecked. It appears from the evidence that less than half an hour's work by an expert would accomplish this result. The door having been taken to pieces during the progress of the trial, it was found that the centre layer of the three layers making up the door, which was supposed and represented to be hardened, drill-proof plates, was neither hardened nor d

of and was easily perforated by an ordinary hand-drill in minute and a half.

I am asked . . . to construe the correspondence between the parties as containing an absolute warranty on the part of defendants that the door furnished by them to plaintiff was proof against the efforts of burglars, without qualification as to time or place. This, as has been pointed out in previous cases, would in fact amount to a contract, by defendants, to furnish for years, if not for all time, the contents of the door, whatever they might be, against burglars: *Walker v. Herring*, 4 F. & F. 745; *Herring v. Skaggs*, 62 Ala. 180; *Sanborn v. Herring*, 6 Am. Law Reg. 457. Such a contract, of course, be made, but the responsibility incurred under it would be so great that the intention of the parties to make it ought clearly to appear. . . .

I think the warranty which was given is that which would have been created by an answer simply in the affirmative to plaintiff's question whether the door in question would furnish "a fair protection against burglars." The defendant, therefore, I think, did warrant . . . that the door in question would furnish a fair, that is to say, a reasonable, protection against burglars; and . . . that the entire face of the door was protected by hardened drill-proof steel which was composed of chilled steel. . . .

In my opinion, all the warranties I have referred to as having been given were broken. Through the negligence of defendants' workmen, and not by any wilful act of defendants, the door . . . was, as it now appears, lacking in the simplest and first requisite which should be found in a door intended to resist burglars, a chilled steel, or drill-proof steel. The lining which was intended to be drill-proof was not chilled, but it had not been chilled, and could therefore be easily penetrated in any part by an ordinary hand-drill. This defect, however, was not taken advantage of by the burglars who robbed the plaintiff. They appear to have proceeded upon the assumption that the door was drill-proof, and they adopted the means of introducing their explosive than by attempting to drill the door. . . .

The warranties given, however, have been broken, as I have pointed out, and the question is as to the amount of damages recoverable. I find that the loss of the money contained in the vault was not a natural consequence of the defect in the vault door, because the presence of these defects was not the reason why the burglars were enabled to break

it open, and the result would not have been different had the defects been absent.

The ordinary rule as to damages where an article supplied with a warranty that it is of a particular character or fit for a particular purpose proves to be of a different character or unfit for the purpose for which it is supplied, is that the purchaser is entitled to the difference in value between the article supplied and one which would have complied with the warranty. That rule is easily applied where the article actually supplied and that which should have been supplied have each some commercial value. In the present case it is difficult to apply it; the plaintiff needed a door which should afford reasonable protection against burglars, and defendants supplied a door which they warranted would give that protection. Being applied to the purpose for which it was intended it was found not to comply with the warranty, and was rendered practically valueless. The defect was a concealed one, and, under ordinary circumstances, was only discoverable by a test which would destroy it. The defendant Thomas West in his evidence says that the door would not be called burglar-proof without the chilled steel plates which this door was warranted to contain and did not contain. The plaintiff therefore, did not get that for which he paid, and which defendants warranted he should get; what they gave him in its place has become useless and valueless, while being put to the use for which it was intended. It is not, therefore, the case of a part loss, as it would have been had it been a mere case of a difference in commercial value, but that of a total loss, like that of the broken carriage pole in *Randall v. Newson*, 2 Q. B. D. 102.

The plaintiff is entitled, in my opinion, therefore, to recover as damages the price, \$250, which he paid to defendants for the door in question, and the costs of the action.

CARTWRIGHT, MASTER.

MAY 29TH, 1903.

CHAMBERS.

ST. MARY'S CREAMERY CO. v. GRAND TRUNK R. W. CO.

Judgment—Mistake in Date—Refusal of Party to Consent to Correction—Costs of Motion to Amend.

Motion by defendants for order to amend the judgment as drawn up and entered, by altering the date.

W. H. Blake, K.C., for defendants.

C. A. Moss, for plaintiffs.

THE MASTER.—The difficulty arose, first, from the in-
 crement of the formal note of the judgment of Mr. Justice
 Meredith on the certified copy of the pleadings being dated
 14th April, though not handed to the Registrar until the 14th,
 with the reasons for same. The second cause was that the
 draft judgment was not submitted to defendants' Toronto
 solicitors, as had been asked by letter of 8th May instant, and
 apparently agreed to. Through misapprehension, the formal
 judgment was not so submitted to them, but was initialled by
 Stratford agents, who had no instructions to approve, and
 was entered at Stratford as of 9th April, instead of 14th. A
 certificate of the 14th being the real date, was obtained from
 the senior registrar at Toronto, and submitted to plaintiffs'
 representative at Stratford. He did not consent to the judg-
 ment being corrected, and this motion was launched on the
 14th instant.

The defendants now ask for costs.

It was pointed out in *Bodine v. Howe*, 1 O. L. R. 208,
 which was followed in *McGuire v. Corry*, ib. 590, that applica-
 tions for consents should not be unreasonably refused. . .

In the present case I cannot see that defendants were in
 any way to blame for the error in the entry of judgment,
 which arose in the way already stated. . . . The costs of
 this motion should be to defendants in any event, as they
 were not in any way responsible for the erroneous date in-
 troduced in the judgment.

MEREDITH, J.

MAY 29TH, 1903.

LEMON v. LEMON.

Venue—Change of—Speedy Trial.

Appeal by Joseph Lemon from order of Master in Cham-
 bers (ante 445) changing venue from Toronto to Woodstock.

J. W. McCullough, for appellant.

W. E. Middleton, for Philip Lemon.

MEREDITH, J., allowed the appeal and set aside the order
 of the Master as regards venue. Costs in the cause.

MCMAHON, J.

MAY 29TH, 1903.

TRIAL.

ARMOUR v. ANDERSON.

Money Lent—Action for—Weight of Evidence.

Action to recover \$875 alleged to have been lent by plain-
 tiff to defendant.

J. W. Nesbitt, K.C., for plaintiff.

S. F. Washington, K.C., for defendant.

MACMAHON, J. (after setting forth the evidence).—The defendant denied having borrowed the money. . . . The defendant impressed me as being truthful, and the circumstances strongly corroborate his evidence that the plaintiff never lent him any money.

There will be judgment dismissing the action with costs.

MACMAHON, J.

MAY 29TH, 1903.

TRIAL.

HARRIS v. BURT.

KING v. BURT.

Trespass—Assault—Personal Injuries—Damages.

Actions by Fanny Harris and Ettlestone Harris and by Solomon King and Amelia King against E. J. Burt and Robert H. Sanderson to recover damages for personal injuries sustained by plaintiffs by reason of the wrongful acts of defendants. Ettlestone Harris was the father of the plaintiffs Fanny Harris and Amelia King, and Solomon King was the latter's husband. The defendants were in the employment of the York Loan and Savings Company. On Sunday the 8th June, 1902, the plaintiffs were driving in High Park along a roadway a portion of which had been made by the York Loan and Savings Company, through whose lands it passed.

G. H. Watson, K.C., and S. C. Smoke, for plaintiffs.

W. M. Douglas, K.C., and W. H. Hunter, for defendants.

MACMAHON, J., found that the plaintiffs were, with their horses, trespassing on the lands of the company adjoining the highway, and while so trespassing the defendants appeared and struck the horse owned by Solomon King, which caused it to run away, and occasioned injury to plaintiffs.

Judgment for plaintiff Solomon King for \$400, for plaintiff Amelia King for \$750, for plaintiff Ettlestone Harris for \$75, and for Fanny Harris for \$400, with costs.

THE ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING JUNE 6TH, 1903.)

L. II. TORONTO, JUNE 11, 1903. No. 22.

FWRIGHT, MASTER.

MAY 29TH, 1903.

CHAMBERS.

SMITH v. McDEARMOTT.

*ence — Foreign Commission — Examination of Defendant on his
Own Behalf—Place for Taking Evidence—Expenses of Opposite
Party—Costs of Application.*

Motion by defendant H. H. Lee for an order directing the
issue of two commissions, one to take the evidence of A. M.
Mcdearmott and Oscar G. Lee at Kansas City, and the other
to take the evidence of applicant himself at Kingfisher, in
Oklahoma Territory.

W. D. Gwynne, for the applicant.

W. N. Ferguson, for the plaintiffs.

THE MASTER.—I think under the cases the material is
prima facie sufficient to justify the issue of a commission to
examine the witnesses said to be resident at Kansas City. I
have looked at the numerous cases cited on the argument and
the English cases therein referred to. I do not see that any
purpose will be served by commenting upon them, as
they shew that each case must be decided on its own facts and
circumstances.

[Porter v. Boulton, 15 P. R. 318, and Mills v. Mills, 12
P. R. 472, referred to.]

I have examined the map, and from it I gather that King-
fisher, where the applicant is said to reside, is not very far
from Kansas City. Under these circumstances, the
order I propose to make is as follows: One commission only
to be issued. If the applicant so desires, it may be to Kansas
City, but I would suggest that some nearer point, such as
Kingfisher, should be named, as, following Mills v. Mills, I

think the applicant should pay at least the actual expenses out of pocket of the plaintiffs' solicitor necessary for his attendance on the commission, before it issues. Costs of motion to plaintiffs in the cause.

CARTWRIGHT, MASTER. .

MAY 29TH, 190

CHAMBERS.

FALVEY v. FALVEY.

Interim Alimony—Wife Leaving Husband—Ability to Support Herself—Application Refused—Special Circumstances.

Motion by plaintiff for an order for interim alimony.

Proulx (Robinette & Godfrey), for plaintiff.

L. V. McBrady, K.C., for defendant.

THE MASTER.—The statement of claim makes the usual allegations, which are repeated in the affidavit of the plaintiff filed on this motion. The statement of defence denies the allegations of plaintiff, and makes serious counter-charges which are repeated in his affidavit, also filed on the motion.

Mr. McBrady relied on the examination of the plaintiff . . . from which it appears that she has been supporting herself up to the 1st day of this month. . . .

Under the facts of this case, I do not think an order should be made for interim alimony. The plaintiff admits that she left of her own accord, and says that she will never consent to live with her husband again. She has refused an offer which under the circumstances, seems generous; at any rate it is much more than she is likely to get by litigation, even if successful. She admits her ability to support herself, and fortunately there are no children to complicate matters. The offer made, I understand from Mr. McBrady, is still open to her, and she would do well to consider the prudence of accepting it.

Allen v. Allen, [1894] P. 134, affirms the principle that interim alimony, if granted, is fixed after considering the incomes of the husband and wife respectively. . . .

In the present case the examination of plaintiff was used on the motion without objection. . . .

According to the best opinion I can form, I think it is not a case for interim alimony. The affidavit of defendant is full and explicit as to his financial position, and is not in any way attacked by plaintiff. Altogether, the facts of this case seem to be very different from those of any of the reported cases.

ET, J.

MAY 30TH, 1903.

TRIAL.

PALMER v. MICHIGAN CENTRAL R. W. CO.

*Way—Farm Crossing—Non-repair of Approach within Farm—
Injury to Tenant of Farm—Duty of Railway Company as to
Repair.*

The plaintiff was tenant of the west half of lot 10 in the concession of Yarmouth, through which the defendants' way passed, and defendants had constructed an overhead crossing across their railway for the use of persons crossing the farm. The approach to the crossing extended to the boundary fence of the railway land into the farm owned by plaintiff. At the time the approach was made the defendants offered to build it of earth with a grade of one foot in 20, but, at the request of the owner, it was built with a grade of one foot in 7, with a covering of gravel. On August, 1902, plaintiff, while descending the portion of the approach within his own fence with a load of oats, was injured. The approach to the crossing within the plaintiff's fences was out of repair, having been worn so that it was out of way to one side, and the accident to plaintiff was caused by the want of repair. No request had been made by plaintiff or any other person to defendants to repair the approach, nor had any notice been given them that it was out of repair.

A. Robinson, St. Thomas, for plaintiff.

F. Hellmuth, K.C., and E. C. Cattnach, for defend-

REET, J.—The liability of defendants is founded upon the provisions of the Railway Act, 51 Vict. ch. 29 (D.), which provide that "every company shall make crossings for persons crossing whose lands the railway is carried convenient and necessary for the crossing of the railway by farmers' implements, carts, and other vehicles." There appears to be no clause in the Railway Act which imposes upon railway companies any further duties or responsibilities in relation to crossings.

The company are authorized by the Act, for the purpose of their undertaking, to divide a farm in two by running a line through it; they are obliged to compensate the farmer for the damage done, and further to make a convenient crossing for him over their line of railway. They are obliged, in other words, to give him the easement of a

convenient right of way over their line for his implements, carts, and other vehicles. The company do not appear to be either obliged or authorized to go upon the land of the owner for any purpose connected with the making of the crossing. If a convenient crossing cannot be made without the building of approaches on the land of the owner, then the presumption would be that the work upon his own land must be done by the owner, in the absence of a special agreement relating to it, and that the expense of such work must be taken into account in fixing the original compensation to be paid to him for the severance of his property by the owner. This would obviously be the case were the land owner affected injuriously by the construction of the railway by being obliged to construct and keep in repair a greater length of drains upon his own land, for instance. *Town of Peterborough v. Grand Trunk R. W. Co.*, 32 O. R. 154, affirmed by the Court of Appeal, 1 O. L. R. 144, seems against the view that an implied liability exists compelling the company perpetually to repair a work which is not upon the owner's own land, even though originally constructed by the company. There is no evidence here to support an agreement on the part of the company to do so in this case, and no such agreement is alleged.

The only want of repair complained of, and to which the accident was due, was with regard to the approach upon the land occupied by plaintiff, and I can find no duty, either express or implied, cast upon defendants to keep this portion of the approach in repair. There was, therefore, no evidence to leave to the jury, and the defendants' motion for a nonsuit should be granted, and the action dismissed with costs.

MEREDITH, C.J.

JUNE 1ST, 1900

CHAMBERS.

MORLEY v. CANADA WOOLLEN MILLS CO.

Pleading—Statement of Claim—Enlargement of Claim made by W—Wrongful Dismissal of Servant—Introductory Statement—Depreciation in Stock of Company—Representations—Particulars

Appeal by defendants from order of Master in Chambers ante 457.

H. Cassels, K.C., for defendants.

C. A. Moss, for plaintiff.

MEREDITH, C.J., dismissed the appeal with costs to plaintiff in any event.

MEREDITH, C.J.

JUNE 1ST, 1903.

CHAMBERS.

MERLAMM v. TORONTO ROLLER BEARING CO.

Findings — Statement of Claim — Statement of Cause of Action — Sufficiency—Damages for not Transferring Stock—Principal and Agent.

Appeal by defendant Henderson from order of Master Chambers, ante 463.

A. E. Hoskin, for appellant.

W. E. Middleton, for plaintiff.

MEREDITH, C.J., dismissed the appeal with costs to plaintiff in any event.

MEREDITH, C.J.

JUNE 1ST, 1903.

CHAMBERS.

AHRENS v. TANNERS' ASSOCIATION.

Discovery—Examination of Officer of Defendant Association—Person Having Knowledge.

Appeal by the Breithaupt Leather Co. from order of Master in Chambers, ante 464.

W. N. Tilley, for appellants.

C. A. Moss, for plaintiff.

MEREDITH, C.J., dismissed the appeal. Costs in the plaintiff's favor.

BRITTON, J.

JUNE 1ST, 1903.

TRIAL.

FENSOM v. CANADIAN PACIFIC R. W. CO.

Damage—Injury to Animals on Track—Neglect to Fence—Escape of Animals from Private Way to Track—Escape from Highway—No Person in Charge at Crossing.

Action for damages for loss of cattle owned by plaintiff and while upon the railway tracks of defendants.

J. H. Clary, Sudbury, for plaintiff.

D'Arcy Scott, Ottawa, for defendants.

BRITTON, J.—The plaintiff resides upon and owns lot 10 in the 4th concession of Lorne, in the district of Algoma. "Sault" branch of defendants' railway runs through

this township, and a considerable portion of the line has not yet been fenced in, as required by the Railway Act. Plaintiff's cattle were at large near his own home, but not unlawfully, as, by a by-law of the municipality, "all milch cows and other cattle," other than certain ones especially excepted, are allowed to roam at large. On 6th August, 1902, certain of these cattle, including one bull, wandered down a path or road leading to the track, travelled a short distance west upon a road parallel with the railway, and, finally, from a part of lot 2 in the 4th concession of Nairn, went upon the track and were killed. I find, on the evidence, that the road on which these cattle took and kept until they entered upon the railway property was not, nor was any part of it, a highway within sec. 271 of the Railway Act; and sec. 194, subsec. 3, of the Railway Act, as amended by 53 Vict. ch. 2, sec. 2, applies, and defendants are liable. The neglect of defendants to fence their track was the cause of plaintiff's loss. The value of the animals killed was \$327. The by-law prohibited the allowing a bull to run at large, and the value of the bull was \$45, leaving \$282.

On 2nd September, 1902, certain other cattle owned by plaintiff strayed and went farther west, entering upon the track at a crossing from a highway. These cattle, being at the crossing without any person in charge of them, were in violation of sec. 271 of the Railway Act, and plaintiff could not recover for them. *Nixon v. G. T. R. Co.*, 24 O. R. 124, and *James v. G. T. R. Co.*, 31 S. C. R. 436, followed. I find the value of the cattle killed was \$143 and the damages for injury to others was \$35.

Judgment for plaintiff for \$282 with costs.

MACMAHON, J.

JUNE 1ST, 1903

TRIAL.

MARSH v. CITY OF HAMILTON.

Way—Non-repair—Injury to Person Crossing Street Railway Tracks—Negligence of Street Railway Company—Contributory Negligence—Liability of Municipal Corporation—Liability of Company

Action against the city corporation and the Hamilton Street Railway Company to recover damages for injuries to a motor car to plaintiff Harold E. Marsh, a boy of eleven years of age, when attempting to cross Locke street in the city of Hamilton. The boy lost his left foot.

J. W. St. John, for plaintiff.

J. W. Nesbitt, K.C., for defendant city corporation.

P. D. Crerar, K.C., for defendant company.

MACMAHON, J., found that the car was running at an excessive speed, at least 15 miles an hour; that the bell was rung, and therefore the attention of the boy was not drawn to the coming of the car; that the boy fell on the street by reason of its being out of repair and in a dangerous condition; and that, had he not fallen, he could have crossed in safety before the car reached him; that, although he fell, he could have regained his feet in time to cross in safety, had it not been for the excessive rate of speed; and that, had it not been for the stones piled on the road, the fender would have worked properly and saved the boy. It was held, therefore, that the cause of the injury to the boy was the negligence of the defendant railway company. The boy in not being was not guilty of any negligence which contributed to the accident, as, even if he had looked and had seen the car coming, he could have crossed without injury had he not fallen. *Brown v. London Street R. W. Co.*, 2 O. L. R. 53, 3 S. C. R. 642, *Danger v. London Street R. W. Co.*, 30 O. L. R. 493, *O'Hearn v. Port Arthur*, 4 O. L. R. 209, distinguished.

Judgment for plaintiff against the company for \$2,500 with costs. As against the city corporation, action dismissed without costs.

JUNE 1ST, 1903.

DIVISIONAL COURT.

SMITH v. BLOOMFIELD.

Master and Servant—Wrongful Dismissal of Servant—Existence of Contract of Hiring—Question for Jury—Excessive Damages—Absence of Direction—County Court Action—Appeal—New Trial not Moved for.

Appeal by defendants from judgment of County Court at Hastings in favour of plaintiff for \$110, being the amount of a verdict found in his favour by a jury.

The action was brought for wrongful dismissal of plaintiff. He alleged that he had been hired by defendants to work on the steamer "Caspian" and had gone on the vessel at Belleville at about midnight between the 8th and 9th July, 1902, and that between two and three o'clock in the morning of the 9th July he had been discharged without any cause, and was put ashore on the bank of the Murray canal about five miles from home, without money, and that he had been obliged to walk back to Belleville, and became ill in consequence. Defendants denied all plaintiff's statements.

The trial Judge simply left to the jury the question as to the hiring, and whether plaintiff had sustained damage by his dismissal.

Defendants moved for a nonsuit at the conclusion of plaintiff's case, and again asked the Judge to instruct the jury that there was no evidence of any contract of hiring, but took no further objection to the charge, and the jury found for plaintiff \$110 damages, for which judgment was ordered to be entered with costs.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

H. M. Mowat, K.C., and J. M. Mowat, Kingston, for defendants.

H. L. Drayton, for plaintiff.

STREET, J.—The motion here is to set aside the verdict and judgment entered for plaintiff and to enter judgment for defendants. It is not, and could not be, under sec. 51 of the County Courts Act, an application for a new trial either alone or coupled with any other relief. The sole question, therefore, which we have to consider is whether plaintiff made out a case which he was entitled to have submitted to the jury. In my opinion, the Judge was right in refusing to withdraw the case from the jury, and he could not properly have done so. It appeared that the captain of the "Caspian" was in need of four additional men, and that he had telegraphed ahead to the agent of defendants at Belleville to try to get them for him. When the steamer arrived there at about midnight, the agent had plaintiff and three other men on the wharf ready to go if required. There was evidence that upon the arrival of the steamer the agent called out to the captain that he had four men for him and asked whether he should send them on board, and was told to do so. Thereupon plaintiff was told to go on board, and did so, and he says that he assisted in hauling the gang plank on board when the steamer left, and that he was willing to do any work he was directed to do. He had been previously employed on the steamer at \$20 a month, and had left or been discharged. He was not put to work, but was ordered to leave the steamer, which he did. . . . These statements were to some extent contradicted, but there was evidence in support of them all which could not be withdrawn from the jury, and the jury might fairly find upon them that defendants had hired plaintiff to work for them either for the trip or for a month, that being the nature of his former hiring by them. . . .

The jury, being of opinion that there was a hiring and a wrongful dismissal, were entitled to give some damages. I think the Judge should have instructed the jury more fully as to the manner in which the damages should be assessed, and that he should have limited them to such as arose naturally and directly from defendants' breach of contract; but no objection was taken to the charge, and no motion for a new trial was made. . . .

I think, however, that there should be no costs of the appeal, in view of the excessive damages which plaintiff has obtained.

FALCONBRIDGE, C.J., gave reasons in writing for the above conclusion.

BRITTON, J.—I agree that the sole question which we have to consider on this appeal is whether plaintiff made out a case as to hiring and dismissal which he was entitled to have submitted to the jury. . . .

[Review of evidence.]

With great respect, I cannot agree that all that took place was evidence of any contract of hiring so that there could be a dismissal, much less a wrongful dismissal, for which this action is brought: see Addison on Contracts, 9th ed., pp. 845, 847.

The plaintiff may have an action for not employing him, or for wrongfully putting him off the steamer after he had been invited to go on board. . . . The sole point is, is there evidence of a hiring? And I think there is not.

PORTWRIGHT, MASTER.

JUNE 2ND, 1903.

CHAMBERS.

KEARNS v. BANK OF OTTAWA.

Leading—Statement of Defence—Malicious Prosecution—Setting out Facts Shewing Reasonable and Probable Cause—Setting out Facts Occurring after Arrest—Remarks of Judge in another Proceeding.

The plaintiff discounted at the North Bay branch of the Bank of Ottawa a note for \$50 purporting to be made by a man of Kearns & Palangie. Four or five weeks after the note had become due, and the same not having been paid, the defendant Kingsmill, local manager of the bank, caused the arrest of the plaintiff on a charge of having obtained money by false pretences. The plaintiff was brought before a magistrate, who, after hearing the evidence, discharged

the plaintiff. The latter then began the present action for malicious prosecution, claiming \$10,000 damages.

The plaintiff moved to strike out the 5th, 6th, 7th, and 8th paragraphs of the statement of defence.

N. Murphy, K.C., for plaintiff.

G. H. Kilmer, for defendants.

THE MASTER.—In this action the defendants might have contented themselves with a traverse of want of reasonable or probable cause, as was the case in *Roberts v. Owen*, 6 Times L. R. 172, cited in *Odgers on Pleading*, 5th Eng. ed., p. 182. This was not done. On the contrary, the pleader endeavoured to shew that the defendants "having good and sufficient cause, the said William Kingsmill caused a warrant to issue for the arrest of the said plaintiff:" see par. 6. In this view he has apparently attempted to justify the conduct of the defendants, relying it may be on *Morse v. Kaye*, 4 Taunt. 34, cited by *Odgers* on p. 182. (I notice this case is not in the revised reports). In that case, however, it may be observed, it was sought to justify the plaintiff's arrest by alleging that he had acted "suspiciously." The Court on demurrer held that the facts from which that suspicion was inferred must be shewn.

The 5th paragraph sets out that Palangie, being asked by Kingsmill's agent why the note had not been paid when due, denied that there was any such firm as Kearns & Palangie, or that he had given authority for either the making or discounting of the note, or that he had in any way received any part of the proceeds. The 6th paragraph states that on application to the plaintiff on 16th January, no satisfaction could in any way be got from him, and that he was thereupon arrested as set out in the statement of claim.

So far as I can see, these two paragraphs are free from objection. They allege matters which may properly be submitted to the jury as shewing reasonable and probable cause. What the result will be is not for us to be troubled with now.

The 7th and 8th paragraphs deal with matters that occurred after the arrest. There is no view that occurs to me in which they can possibly afford any justification of the conduct of the defendants. The question is: Had the defendants reasonable and probable cause at the time when the information was laid? To supply an answer to this, the grounds of the decision of the magistrate are not in any way helpful. The only important fact is that the plaintiff was discharged. If the defendants desire, so much of the 7th

paragraph as states this fact may remain. The rest, in my opinion, should be expunged. So too should the whole of the 9th paragraph. It consists of a statement of facts occurring after the plaintiff's acquittal. It sets out how the defendants then attempted to recover the amount of the note in the Division Court, how the plaintiff did not appear, but the alleged partner Palangie successfully defended himself. The paragraph concludes with a remark said to have been made by the presiding Judge at the trial in the Division Court, which should not in any case be allowed to remain on the record, as it might prejudicially affect the plaintiff's case.

I therefore dismiss the motion so far as the 5th and 6th paragraphs are concerned. But, even allowing the wide range given in the leading case of *Stratford Gas Co. v. Gordon*, 14 P. R. 407, I think the 7th and 8th must be dealt with as stated above. The first two paragraphs and the first clause of the 9th paragraph of the statement of defence could probably have set up all that the defendants need have said. As the success has been divided, there will be no costs on the motion.

JARTWRIGHT, MASTER.

JUNE 2ND, 1903.

CHAMBERS.

ALLEN v. CROZIER.

Security for Costs—Motion to Set aside Præcipe Order—Plaintiff out of Jurisdiction—Money in Hands of Defendant—Action for Account.

Motion by plaintiff to set aside a præcipe order for security for costs in an action against a solicitor.

T. H. Lloyd, Newmarket, for plaintiff.

J. W. McCullough, for defendant.

THE MASTER.—The facts have been fully gone into in the *Solicitor*, 2 O. W. R. 268. The costs have been taxed, and amount to a considerable sum. The exact figures have not been furnished. But, on the theory that the solicitor is bound to account for the rents, there would be about \$450 due to the plaintiff. The defendant, it appears, has become the assignee of two judgments against the plaintiff. On these there is due about \$800. It is admitted that he gave only about \$100 for them. If he can claim the full amount, there would still be due to him from the plaintiff \$350. If the defendant is only entitled to the \$100, then the plaintiff would be entitled to \$350 or thereabouts.

In this state of facts a motion is made to set aside the order for security for costs, plaintiff's counsel relying on Mr. Winchester's judgment in *Re Solicitor* and on *Duffy v. Donovan*, 14 P. R. 159.

I think the motion cannot succeed.

The case of *Duffy v. Donovan* is entirely different, as will appear from a perusal of the case. There the receipt of the trust funds was admitted by both defendants; here the very point to be decided is, whether the assignment of the rents to the defendant was absolute or only by way of security. That point cannot be usefully considered at present. If on the filing of the defence any admissions should be made in corroboration of the plaintiff's claim, he might possibly have grounds to renew his present motion. Then there is the question of the judgments of which the defendant is assignee, and which he will no doubt set up by way of counterclaim at the proper time. On the question raised as to this by the plaintiff it would also be premature to express any opinion. If the defendant can successfully maintain his position on either of these points, then the right to security for costs is clear. I am not sure if Mr. Lloyd relied in any way on the concluding paragraph of the judgment in *Sample v. McLaughlin*, 17 P. R. 491. I do not, however, understand that to lay down a general rule. If it did so, it would not have been necessary to the decision of the case, which it has been since held was, that the solicitor, by the use of the names of the plaintiffs (whether authorized or not), had made them parties, and so was himself the actor. This makes a written retainer more a necessary precaution in every case. On the whole facts of this case, I do not think the order for security should be set aside.

Costs of this motion will be in the cause.

TEETZEL, J.

JUNE 2ND, 1903.

TRIAL.

REYNOLDS v. TRIVETT.

Limitation of Actions—Real Property Limitation Act—Enclosing Wild Land—Occupancy—Knowledge of Owner of Paper Title.

Action for a declaration that a certain deed by one Allen to defendant Trivett dated 29th February, 1888, and a mortgage made by Trivett to the representatives of the Cawthra estate, were a cloud upon plaintiff's title to the north part (114 acres) of the west half of lot 3 in the 9th concession of Gwillimbury, and for other relief.

John MacGregor, for plaintiff.

T. J. Robertson, Newmarket, and J. H. Moss, for defendant Trivett.

TEETZEL, J.—I find that by deed dated 22nd July, 1887, plaintiff became possessed of a good paper title to the whole lot 3, save 200 acres on the front or north end thereof, and conveyed for taxes to William Cathcart, by deed dated 3rd October, 1831, and the plaintiff claims that such title covers the 14 acres in question in this action. Defendant's paper title to the north 100 acres is derived from the same deed. The first conveyance in the chain of title thereafter, dated 24th April, 1860, describes it as the north 100 acres of the west half—metes and bounds being given . . . There can be no question as to the sufficiency of the defendant's paper title to the north 100 acres, but he has not a perfect paper title to the south 14 acres. . . .

I find as a fact that Ezra Grant, the original grantor of the 114 acres to defendant, built a substantial log and pole fence along the south boundary of said 114 acres in 1880 or 1881, and that, when defendant purchased the property, in good faith supposed it marked the southern limit thereof and has ever since maintained it as a boundary fence.

I also find as a fact that in 1888 and 1889 similar fences running north from this fence were built along the easterly and westerly boundaries of the 14 acres, connecting with the other line fences of plaintiff and completely enclosing the 14 acres with the other lands of plaintiff to which he had a good paper title.

Ever since the 14 acres were so enclosed, defendant has, either by himself or his tenants, lived upon and occupied the 14 acres as an enclosed farm, having cleared and cultivated the greater part of the front 100 acres of it, and having used the 14 acres with other uncleared land adjoining to the north as one undivided bush, in the usual course of husbandry, for pasture and firewood.

In my opinion this continuous occupancy and use of the enclosed premises as a whole, for more than ten years prior to the commencement of this action, was such actual, continuous, and visible occupation thereof as to vest in defendant a good possessory title to the 14 acres. See *McConaghy v. Newmark*, 4 S. C. R. 632; *Harris v. Mudie*, 7 A. R. 414; *Intyre v. Thomson*, 1 O. L. R. 163, and other cases therein cited.

I am of opinion that this lot of 14 acres, when taken possession of by defendant, was in a state of nature, and has not since been cultivated or improved except by fencing, but

I find as a fact that for more than ten years before the commencement of this action, plaintiff had knowledge of the actual possession and use of the land by defendant in manner aforesaid. . . .

Action dismissed with costs as against defendant Trivett.

JUNE 2ND, 1903.

C. A.

REX v. NOEL.

Criminal Law—Conviction for Shooting with Intent—Leave to Appeal—Constitution of Grand and Petit Jury—Rejection of Evidence.

Motion by defendant for leave to appeal from his conviction before MEREDITH, C.J., at Ottawa, upon an indictment under sec. 241 of the Criminal Code, for shooting at one Larocque, with intent to do bodily harm. The defendant was sentenced to five years' imprisonment. The grounds of the motion were that certain evidence, tendered on behalf of defendant, was wrongly excluded, and secondly, that four of the petit jurors were taken to fill vacancies in the grand jury, and defendant was thereby deprived of his usual right to a panel from the lawful number of jurors.

E. E. A. DuVernet, for defendant.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—Without expressing any opinion as to the soundness of either of the objections taken to the proceedings, viz., the constitution of the grand and petit jury, and the refusal of the learned trial Judge to allow the prisoner's counsel to re-examine the witness Pepin, we think they are such that the prisoner should have, if he desires it, an opportunity of arguing them upon a case reserved. In dealing with the latter objection it will probably be necessary that the whole of the evidence at the trial should be before us, having regard to the provisions of sec. 746 (f) of the Criminal Code. As to the former, counsel may be referred to *Burley v. The State*, 1 Neb. 385; *Runnels v. The State*, 28 Ark. 121; *Finley v. The State*, 61 Ala. 201; *Scott v. The State*, 63 Ala. 59; and the provisions of the Jury Act and the Criminal Code bearing on the subject.

BRITTON, J.

JUNE 3RD, 1903.

TRIAL.

FRANK v. HOHL.

Deed—Conveyance of Land—Action to Set aside—Improvidence—Want of Independent Advice—Absence of Consideration—Costs of Action.

Action brought to set aside a conveyance made on the 3th December, 1900, by plaintiff to defendant of the west half of lot 39 in the 2nd concession south of the Talbot road in the township of Middleton, in the county of Norfolk. It was alleged that plaintiff did not understand that he was executing an absolute conveyance, and did not intend to do so, and that the transaction was an improvident one, and that plaintiff entered into it without having any independent advice, etc. Plaintiff, a German who did not understand English very well, was, at the date of the execution of the conveyance, about 83 years of age and in bad health. His wife, an aged woman, crippled by rheumatism, lived with him. He never had any children. The farm conveyed was not incumbered, and was practically the whole of plaintiff's estate. The farm was of the value of at least \$2,500. Defendant was a young man, not related to plaintiff, but a favourite with plaintiff.

R. A. Dickson, Delhi, for plaintiff.

G. W. Wells, K.C., for defendant.

BRITTON, J.—Upon the whole evidence, the conveyance ought not to stand. *Waters v. Donnelly*, 9 O. R. 391, referred to. The defendant did not prove nor did it appear in this case "that everything was right and fair and reasonable on the defendant's part." "The transaction must have been known to defendant to have been an improvident one on the part of the plaintiff, who had no proper advice in regard to it." The conveyance from plaintiff (and his wife, a bar dower) to defendant must be set aside on the ground of improvidence and want of independent advice and absence of consideration. No actual fraud has been proved against defendant. He accepted what plaintiff, without advice, was improvidently giving, but he did not urge it upon plaintiff. Indeed he did not appear to realize that plaintiff was giving a farm of considerable value, practically for nothing, and placing himself and his aged wife at the mercy of defendant for a penny of spending money or for an article beyond what could come under the words "respectable maintenance and

support." For these reasons the judgment will be with costs. Defendant may retain possession until 1st December 1903, upon terms.

CARTWRIGHT, MASTER.

JUNE 4TH, 1903.

CHAMBERS.

HALL v. LAPLANTE.

Discovery—Affidavit on Production — Privilege — Confidential Communications—Solicitor and Client—How to Claim Privilege

By an order made on the 28th April, 1903, defendant directed to file a further and better affidavit on production shewing "the nature of the correspondence without any ambiguity whatever, in order that there may be no doubt as to its being privileged," as in *Clergue v. McKay*, 3 O. L. R. 480.

The defendant accordingly, on 4th May, filed a further affidavit, but plaintiff, being still dissatisfied, moved for a better affidavit.

D. L. McCarthy, for plaintiff.

W. H. Blake, K.C., for defendant.

THE MASTER.—In *Clergue v. McKay*, the principles which protection is allowed on the ground of professional privilege are stated, and may be found set out at length in the English cases followed and approved in that judgment. If any further information is desired, the whole subject may be found discussed and illustrated in *Bray on Discovery*, 372-377.

Taking the rule laid down by Cotton, L.J., in *Garratt v. Irwin*, 4 Ex. D. at p. 53, as the true test, then this second affidavit of defendant is still defective.

The letters referred to in the first two paragraphs should be separated, as can easily be done by setting out first those which come under the first paragraph and then those which come under the second. Let them be numbered, and the first six (or as the case may be) are those under the first paragraph, and the remainder are those under the second paragraph. And it would be well to use the exact language of the judgment of Cotton, L.J. . . .

The 5th paragraph does not seem to claim any privilege. Unless this can be done on a further affidavit, the two letters therein referred to must be produced. See *Milbank v. Bank*, [1900] 1 Ch. 376.

Costs to plaintiff in any event.

TTON, J.

JUNE 5TH, 1903.

CHAMBERS.

RE SAVAGE.

*— Construction — Devise — Revocation by Codicil — Effect of—
Specific Devises—Residuary Devise—Construing Will on Chambers
Application.*

John Savage died on the 22nd May, 1890, leaving a will dated 22nd April, 1869, and a codicil thereto dated 23rd April, 1869.

By the will (cl. 3) he devised to his wife, Mary Ann Savage, all his real estate for life; and after her death (cl. 4) he devised to H. M. lot 31 on the north side of Henry street; (cl. 5) to B. B. lot 30 on the north side of Henry street; (cl. 6) all the residue of his real estate to J. B. and W. in trust to devote the income and profits to the relief of poor people in the town of Prescott.

The codicil was as follows:

"I hereby revoke my said last will and testament in so far as the same relates to or affects those certain portions or parcels of my real estate, namely, all and singular lot 26 on the south side of Henry street . . . and town lot letter . . . and change and substitute for such portion or portions part or parts of said will as refer to or affect the above named parcels of my real estate the following disposition and devise:—I give, devise, and bequeath my said above named real estate unto and to the use of my beloved wife Mary Ann Savage, her heirs, executors, administrators, and assigns, for her and their sole and only use and benefit."

Mary Ann Savage was the executrix of the will. She died on the 7th February, 1902, leaving a will.

The executors of the will of Mary Ann Savage applied for an order declaring the construction and interpretation of the will of John Savage and of the will of Mary Ann Savage, and for the opinion, advice, and determination by the Court of the questions: (1) Does the codicil to the will of John Savage revoke clause 6 of his will? (2) If it does, is there an intestacy as to the real estate not specifically devised, or did Mary Ann Savage take an estate in fee simple in the real estate not specifically devised? (3) If the codicil does not revoke clause 6, is the devise in clause 6 to J. B. and W. a valid devise, or is it void for uncertainty or otherwise? (4) If void, did Mary Ann Savage take an estate

therein, or is there an intestacy as to the land mentioned in clause 6?

G. H. Watson, K.C., for executors.

W. E. Middleton, for Ada Savage.

T. Mulvey, K.C., for devisees of widow.

P. K. Halpin, Prescott, for beneficiaries under will of John Savage.

BRITTON, J., held that the codicil executed on the 23rd April, 1869, to the will of John Savage of 22nd April, 1869, revoked the devise in clause 6. (2) That Mary Ann Savage took an estate in fee simple in all the real estate of John Savage not specifically devised.

Quære, whether a Judge in Chambers ought to assume jurisdiction to answer questions so important as to construction. R. S. O. 1897 ch. 129, sec. 39, *In re Williams*, 1 Ch. 372, *Re Hooper's Will*, 7 Jur. N. S. 595, *Re Lorenz*, L. T. N. S. 501, and *Re Evans*, 30 Beav. 232, referred to.

Costs of all parties out of estate.

MEREDITH, C.J.

JUNE 5TH, 1903

CHAMBERS.

JOHNSTON v. LONDON AND PARIS EXCHANGE.

Security for Costs—Action for Penalties—Statute—Provision as to Consent of Attorney-General — Effect of Obtaining Consent — Unsubstantial Plaintiff—Common Informer—Rule 1200.

Appeal by plaintiff from order of Master in Chambers ante 468, requiring appellant to give security for costs.

George Bell, for plaintiff.

R. B. Beaumont, for defendants Parker & Co.

MEREDITH, C.J., dismissed the appeal with costs to respondents in any event.

MEREDITH, C.J.

JUNE 5TH, 1903

CHAMBERS.

MCDONALD v. PARK.

Parties—Joinder of Causes of Action—Action to Set aside Will and Establish Earlier Will—Different Beneficiaries—Inconvenience—Jurisdiction of High Court.

Appeal by plaintiff from order of Master in Chambers striking out paragraph 4 of the statement of claim and making other necessary excisions, on the ground of impropriety.

under of separate and distinct causes of action, viz., a claim set aside a will, and a claim to establish an earlier will.

Casey Wood, for plaintiff.

C. A. Moss, for defendant George McDonald.

W. E. Middleton, for other defendants.

MEREDITH, C.J., varied the order by restoring paragraph but not interfering with the striking out of the paragraph the prayer for relief which specifically asked that the earlier might be established, without prejudice, however, to the plaintiff contending that he was entitled to that relief under general prayer, and made the costs here and below costs the cause.

MCMAHON, J.

JUNE 5TH, 1903.

TRIAL.

RODERICK v. SUPREME TENT OF KNIGHTS OF
THE MACCABEES OF THE WORLD.

Insurance—Death of Insured—Presumption—Absence for Seven Years—Rebuttal of Presumption—Circumstances—Evidence.

Action by Annie Roderick upon a benefit certificate for \$1000 issued by defendants. The question for trial was, whether Francis Edgar Roderick, the insured, and husband of plaintiff, was alive or dead. He was one of the charter members of Amity Tent, No. 120, of Hamilton. He was married to plaintiff in 1886, and the certificate was issued to him on 9th September, 1893. Plaintiff was named as beneficiary therein. Roderick came to Hamilton from Rockett's Harbour, in the State of New York. He left Hamilton early in February, 1894, remained a few days, and again returned, and was last heard from by his wife in a letter which he wrote to her from Buffalo on the 14th May, 1894. He paid the monthly dues called for by the certificate up to the time of his death. The plaintiff paid all dues since up to the time the action was brought. Roderick was secretary of the camp of the Independent Order of Foresters at Hamilton, and upon his leaving Hamilton it was found that he had collected from the members about \$100, for which he had not accounted. An information was laid and a warrant issued on February, 1894, for his arrest.

G. Lynch-Staunton, K.C., for plaintiff.

W. M. McClellmont, Hamilton, and H. H. Bicknell, Hamilton, for defendants.

MACMAHON, J., held that when a person is absent for seven years without being heard from by those with whom he would naturally communicate were he alive, the presumption is raised that he is dead. Regard, however, must always be had to the circumstances under which the person absented himself, and as to whether he would probably communicate his whereabouts to his relatives. Roderick had committed a criminal offence and left Canada under a cloud, and that would render it improbable that he would let his whereabouts be known. And slight evidence will rebut the presumption of death after the seven years have elapsed. There was uncontradicted evidence that Roderick was in Chicago in 1890 and the seven years presumption has been effectually rebutted. See *Providential Assurance Co. v. Edmond*, 12 App. Cas. at pp. 512-3; *Watson v. England*, 14 Sim. 23; *Bowden v. Henderson*, 2 Sm. & G. 360.

Action dismissed with costs.

JUNE 5TH, 1900

DIVISIONAL COURT.

MATTHEWS v. CITY OF HAMILTON.

Nuisance—Municipal Corporation—Sewer—Discharge of Hot Water into Bay—Effect upon Ice—Vessel Moored in Bay—Injury to Damages—Right of Owner of Vessel to Maintain Action.

Appeal by defendants from judgment of County Court of Wentworth, awarding plaintiffs \$200 damages and costs for injuries caused to a certain steamer, "Acacia," the property of plaintiffs, by reason of alleged negligence of defendants.

F. MacKelcan, K.C., for defendants.

E. H. Ambrose, Hamilton, for plaintiff.

THE COURT (STREET, J., BRITTON, J.) held that defendants have the right to discharge water from their sewers into Burlington bay, provided they do not interfere with the rights of persons lawfully using the waters of the bay. The plaintiffs were lawfully using these waters in mooring their steamboat at the wharf during the winter months. The evidence establishes damage to plaintiffs caused by the discharge from defendants' sewer into the bay of hot water, by the effect of which the ice forming about plaintiffs' vessel was affected, and the safety of the vessel mooring was interfered with. The discharge of the hot water into the bay was, under the circumstances, a public nuisance.

the plaintiffs, having received special and peculiar damage from it, are entitled to maintain this action: 10 Am. & Eng. Ency. of Law, 2nd ed., p. 248; 21 ib. p. 442; Wood on Damages, 2nd ed., sec. 480; Original Hartlepool Collieries v. Gibb, 5 Ch. D. 713; McDonald v. Lake Simcoe Ice Co., 26 A. R. 416, 31 S. C. R. 133; Ellis v. Clemens, 21 O. 227.

Appeal dismissed with costs.

OSLER, J.A.

FEBRUARY 14TH, 1903.

C.A.—CHAMBERS.

THE ONTARIO CONTROVERTED ELECTIONS ACT.

Order of Petitions—Charges and Expenses of Stenographers—Payment.

Applications having been made for payment of the charges and expenses of stenographers attending the trials Provincial election petitions out of the deposits of \$1,000 in each case made by the petitioners under secs. 13 and 14 of the Ontario Controverted Elections Act, the following memorandum was prepared by

OSLER, J.A.—The Rota Judges, after full consideration, are all of opinion that such charges and expenses are not payable out of, or a charge upon, the deposit.

Section 13 expressly defines the purposes for which the priority is given, viz., payment of all costs, charges, and expenses that may become payable by the petitioner: (a) every person summoned as a witness on his behalf; or (b) the member or candidate against whom the petition is presented. Section 102 refers to no other costs, charges, and expenses than these. The amendment introduced into it by Ordw. VII. ch. 12, sec. 4, does not in the least enlarge or extend its meaning, and confers upon the Judges no more power to order payment of the reporter's expenses out of the deposit than those of the registrar. The reporters' maintenance is not directed by the Judges, as in the case of a trial under the Dominion Act, or by the parties, but by the Attorney-General's department, and their expenses form, or, in the opinion of the Judges, should form, part of the expenses of the Court, and be defrayed just as are those of the registrar.

The practice under the Dominion Controverted Elections Act has been referred to as warranting the orders now applied for, but, besides that the reporters are not Dominion officers, the provisions of the Dominion Act on the subject

are express (secs. 41, 43, R. S. C. ch. 9), and make the expense of employing the shorthand writer—whose attendance is directed by the Judges—costs in the case.

Considering that election petitions are intended to be tried and disposed of as nearly as possible in the same way as an ordinary action in the High Court, there seems no reason why the litigants should have the expenses of the report in the former if they do not in the latter. Rather is it contrary the case, as there is an element of public interest attaching to an election petition which is absent from a mere action between private parties.

BOYD, C.

JUNE 5TH, 190

TRIAL.

SELBY v. MITCHELL.

Sale of Goods — Machinery — Action for Price — Counterclaim for Breach of Warranty—Appreciation of Evidence.

Action by a firm of machinists carrying on business in the city of Kingston against a firm of contractors in the town of Gananoque to recover the value of an engine installed in the defendants' boat and the value of work done and materials supplied, the amount claimed being \$633.80.

The defendants alleged that the plaintiffs never installed an engine and boiler in the boat in accordance with the agreement, and counterclaimed for \$500 damages for the loss sustained by reason of the engine and boiler being worthless and them and defective, and for breach of warranty.

A. B. Cunningham, Kingston, for plaintiffs.

D. M. McIntyre, Kingston, for defendants.

BOYD, C.—I have read over the whole of the evidence in this case, i.e., what was taken before me and the further evidence taken before the Master, and have considered the very full and able arguments supplied by both sides.

The evidence both as to the facts and the scientific aspects of the case is extremely conflicting, but on the main matter in dispute I think the defendants have failed to shew that there was any such explicit and minute guarantee as they set forth. What was guaranteed was that which is found in the letter of 19th May from plaintiffs: "We will guarantee the working of the engine and the boiler"—i.e., in a reasonable way. The chief complaint at first was as to the engine, and another one has been supplied, which does not appear to be open to any serious objection. The boiler was not objected to till afterward, and then it was on the ground that

the heating surface was inadequate. But that is based, I think, upon the claim of the defendants to have a speed of nine or ten miles an hour, which the plaintiff did not agree to provide for.

The defendants' own witnesses say "that the boiler is good except as to capacity," and another "that it is large enough to drive the boat 6 or 7 miles an hour," but it will not supply this continuously.

Against this there is the evidence of the plaintiffs that they made good time with the boat, and of the man who invented this kind of boiler, that it is sufficient for its work. The tests applied by the defendants appear to be rather hypercritical, having regard to the absence of the guarantee claimed by the defendants.

The best conclusion I can reach is, that that is a fair sum admitted by Mitchell, one of the defendants, that he offered the plaintiff \$575 and "call it square" before action brought.

The best conclusion I can reach is, that that is a fair sum to be paid by the defendants, \$575, with costs of action to plaintiffs. Counterclaim dismissed without any costs either way.

JUNE 5TH, 1903.

DIVISIONAL COURT.

GILLETT v. LUMSDEN.

Trade Mark—"Cream Yeast"—Protection—Acquisition of Right by User—Abandonment—Injunction.

Appeal by defendants from judgment of Street, J. (4 L. R. 300, 1 O. W. R. 488), in favour of plaintiff in an action to restrain defendants from infringing plaintiff's registered trade mark for "Gillett's Cream Dry Hop Yeast," for selling yeast cakes under the name of "Jersey Cream Yeast." The Judge below held the words "cream yeast" were not the proper subject of a trade mark, being common words of description, but that, the plaintiff's yeast having acquired a reputation in the market under the name of "cream yeast," that name was his property as against persons seeking to use it for the purpose of selling other goods of the same character, and he was entitled to have defendants restrained from so using it.

The appeal was heard by BOYD, C., FERGUSON, J., MACKEN, J.A.

G. F. Shepley, K.C., and F. C. Cooke, for defendants.

C. A. Masten and J. H. Spence, for plaintiff.

BOYD, C.—The plaintiff puts his case on this, that he is entitled to the exclusive use of the word “cream” in connection with yeast. It is not contended that there is any similarity by the make-up of the goods in the packages of defendants with those of plaintiff—the appeal to the eye would inform any one of the difference—but in ordering cream yeast, which the plaintiff’s is called, there would be “awkwardness” in confounding defendants’ Jersey cream yeast with it. There is no proof of actual deception—but all rests on the opinion of the manager of plaintiff.

There was no proof of advertising plaintiff’s goods as “cream yeast” prior to defendants’ use of the name complained of. The evidence at most puts it thus, that an order for “cream yeast” might cause confusion between plaintiff and defendants’ products; but the same witness says that defendants’ output is known in the trade as “Jersey Cream Yeast.” The defence shews that the name of “Jersey Cream” was honestly come by, being used by defendants in baking powder since 1890—and repels any idea of fraudulent appropriation, though that this is not essential in passing-off cases. It makes in the same direction of honest dealing, that the article made by plaintiff was not in the market advertised and openly vended when defendants began to use “Jersey Cream” in yeast cakes—the sale had been for years in abeyance—though that is not fatal to plaintiff’s right to recover, if otherwise entitled. There is no copying of any part of plaintiff’s label as to directions by defendants, as Mr Justice Street appears erroneously to have thought.

Assume that the plaintiff has a trade mark or label in which the words “cream yeast” are used, yet there is no invasion of this on defendants’ part—there is no colourable imitation of the whole thing which is the trade mark.

Then I think this case is covered by . . . *Raggett v Findlater*, L. R. 17 Eq. 29. “Cream” is used by plaintiff merely as a descriptive word to suggest the frothing appearance of the yeast as it works (yeast froths like cream), and as a word in common use to indicate a creamy, frothy loaf—it is not to be monopolized by plaintiff: In *re Smokeless Powder Co.’s Trade Mark*, [1892] 1 Ch. at pp. 194-6. To adapt the language of *Malins, V.-C.*, in the case cited, “the word ‘Jersey’ completely distinguishes it from plaintiff’s” as does also the character and form of the label.” L. R. 17 Eq. at p. 43. There is no evidence going to shew that the user of the words by plaintiff has been so long and so exclusive as to make the descriptive term in any sense distinctive.

sides, Jersey cream is actually used in defendants' preparation, and a man may state that fact on his label without being exposed to injunction: see *Turton v. Turton*, 42 Ch. at p. 147.

Here there is no obvious imitation by defendants of plaintiff's label or of the words he uses in it, judged by ocular inspection, and, according to the latest decision, "the eyesight the Judge is the ultimate test:" per Farwell, J., in *Bourne Swan*, [1903] 1 Ch. 229. . . .

The action fails and should be dismissed with costs, and the appeal allowed with costs.

FERGUSON, J., gave written reasons for the same conclusion.

MACLAREN, J.A., also concurred.

RTWRIGHT, MASTER.

JUNE 6TH, 1903.

CHAMBERS.

CASTLE v. CHAPUT.

Parties—Adding Party—Alternative Relief—Joinder of Causes of Action—Jury Notice—Leave to Give after Time Expired.

Motion by plaintiff for leave to add as a defendant one C. Campbell referred to in the 3rd paragraph of the statement of defence as a traveller in the employ of the defendants who acted for them in the transaction out of which the present action arose.

R. C. H. Cassels, for plaintiff.

W. E. Middleton, for defendants, contended that, although plaintiff might have a separate cause of action against Campbell, it was not so connected with the action against the defendants as to be capable of being joined to it.

THE MASTER referred to *Bennetts v. McIlwraith*, [1896] Q. B. 464, *Honduras R. W. Co. v. Tucker*, 2 Ex. D. 301, and *Thompson v. London County Council*, [1898] 1 Q. B. at 845, and proceeded:—

In deciding these questions in Chambers, the pleadings only can be looked at. The question is, what does the party allege? Not, what can he prove? If the present action had been brought at first against the present defendants and

Campbell, could the latter have been rightly struck out as not being a proper party under *Thompson v. London County Council* and cases following that decision? Has not this point been made clear by . . . *Tate v. Natural Gas Co.* 18 P. R. 82? That case was followed in *Langley v. Law Society of Upper Canada*, 3 O. L. R. 245, where (p. 249) Meredith, J., speaks of the plaintiff being in doubt as to the person from whom he is entitled to redress, as being the decisive point for consideration. . . .

I am of opinion that an order should go in the same terms as to costs and otherwise as in *Tate v. Natural Gas Co.*

In the same case a motion was made for leave to give a jury notice, which was overlooked, as explained by affidavit of plaintiff's solicitor. This should be allowed on the authority of *Macrae v. News Printing Co.*, 16 P. R. 364.

As this will be embodied in the same order as the other relief asked for, it is not necessary to make any separate provision as to the costs.

CARTWRIGHT, MASTER.

JUNE 6TH, 1903

CHAMBERS.

HASKINS v. MAY.

Evidence—Examination of Witness de Bene Esse—Order for.

Motion by defendant for an order allowing him to examine a witness, one Isabelle Hartwell, de bene esse.

S. H. Bradford, for defendant.

C. A. Moss, for plaintiff.

THE MASTER.—As defendant is willing to furnish plaintiff with a copy of the depositions free of charge, I think the usual order may go for the examination de bene esse of Isabelle Hartwell. Whether or not her evidence will be material must be left for determination at the trial, and cannot be usefully considered now.

The defendant makes out the usual prima facie case, and I am unable to see any ground on which the order can be properly refused.

The costs of the motion will be disposed of by the taxing officer.

RTWRIGHT, MASTER.

JUNE 6TH, 1903.

CHAMBERS.

JOHNSTON v. LONDON AND PARIS EXCHANGE.

*Recovery—Production of Documents—Action for Penalties—Præcipe
Order for Production by Defendants—Setting aside.*

Motion by defendants to set aside an order issued by plaintiff on præcipe for production of documents by defendants. The action was brought to recover penalties under s. 17 of 63 Vict. ch. 24 (O.).

R. B. Beaumont, for defendants, contended that the order was futile and useless and therefore unnecessary.

George Bell, for plaintiff, contended that the order should not be set aside, but defendants should be left to claim privilege, if so advised.

THE MASTER.—There are no cases that are exactly in point. But *Malcolm v. Race*, 16 P. R. 330, does not seem to be distinguishable in principle. . . . This judgment was given with approval in *Hopkins v. Smith*, 1 O. L. R. 659. In that case a motion was made similar to the one under consideration. I therefore make the order that was made by the Chancellor in that case, setting aside the order for production with costs to defendants in any event.

EREDITH, J.

JUNE 6TH, 1903.

CHAMBERS.

RE MOUNT v. MARA.

Division Court—Jurisdiction—Amount in Dispute—Claim for Price of Horse—Sale by Wrongdoer—Contract or Tort—Prohibition.

Motion by defendant for prohibition to a Division Court. The plaintiff sued for the price of a horse sold to defendant. There was no dispute as to the agreement for sale. The only dispute, was as to the time and manner of delivery of and payment for the horse. The horse was delivered to defendant by plaintiff's brother, in plaintiff's absence, and the price was paid to the brother. Plaintiff contended that the brother had no authority to receive payment, and, as it was so found, and also that the money never reached plaintiff, judgment was given against defendant for the price of the horse. This motion was made on the

ground that plaintiff's claim was really one in trespass or trover, and that the amount claimed and for which judgment went was beyond the Division Court jurisdiction.

J. C. Judd, London, for defendant.

W. McDiarmid, Lucan, for plaintiff.

MEREDITH, J., held that there was nothing to prevent plaintiff treating the taking of the horse by defendants as a valid delivery under the contract, and that he did, electing to sue upon the contract, and not for trespass or trover. Plaintiff had the choice of suing upon the contract or of treating the taking of the horse as wrongful, and suing for the wrong. See Roscoe's N. P., 16th ed., pp. 528, 588, 589.

Application dismissed with costs, fixed at \$10.

THE ONTARIO WEEKLY REPORTER.

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ARTWRIGHT, MASTER.

JUNE 8TH, 1903.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. MUNNS.

Summary Judgment—Rule 603—Implied Covenant for Payment—Instrument of Charge—Defence—Unconditional Leave to Defend.

Motion by plaintiffs for summary judgment under Rule 603 in an action on the covenant for payment deemed to be implied or implied in a transfer by way of mortgage or charge under the Land Titles Act.

F. J. Dunbar, for plaintiffs.

G. Grant, for defendant.

THE MASTER.—The plaintiffs' claim in this case is similar to the cause of action in *Wilkes v. Kennedy*, 16 P. R. 204. In that case the charge was created by an instrument dated 15th March, 1890. In the present case the charging instrument bears date 22nd October, 1890. A further coincidence is found in the fact that in *Wilkes v. Kennedy* a "William Munns" was one of the mortgagees under whom Wilkes claimed as assignee. In that case Munns made an affidavit corroborating the defence of Kennedy that at the time of the creation of the charge "it was clearly understood and agreed that the equity of redemption alone was being dealt with and that he was to give no covenant for payment of mortgages thereon, but that the land alone was to be liable." . . . Mr. Munns, being now the defendant, has made an affidavit similar to that made for Kennedy. . . .

In my opinion, the motion must be refused, in face of the contradicted affidavit. This, as it seems to me, is corroborated in an unusual way by the only affidavit filed in support of the motion. . . . That affidavit verifies the indorsement on the writ of summons. I have tested the figures, and find that no interest has ever been paid from the very start on the principal sum. The result is, that interest and

compound interest largely exceed the principal. It is not to be forgotten that the liquidator of the plaintiffs (whose clerk makes the affidavit) is not in a position to know what may have been said by the officials of plaintiffs in October, 1890. . . . Besides this, the instrument contained a covenant by one Henderson, which, as defendant contends, took the place of the mortgagor's covenant. These two circumstances are very cogent, in my opinion. They are both quite independent of defendant's assertion, and until explained or displaced tend strongly to corroborate defendant's story.

In view of the language of Lord Halsbury, cited by the Chancellor in *Wilkes v. Kennedy*, from *Jones v. Stone*, [1894] A. C. 124, and of the whole current of the later decisions down to *Jacobs v. Booth's Distillery Co.*, 85 L. T. R. 262 (for which I again refer with much pleasure to Mr. A. MacGregor's very useful article in 39 C. L. J. p. 259), there can be no doubt that the motion cannot succeed.

The liquidator was acting reasonably and according to his duty in making the motion, and was very excusably in ignorance of the facts alleged in defendant's affidavit. Under these circumstances, the costs of the motion will be in the cause.

[On appeal from this decision, argued by the same counsel, on the 12th June, 1903, before STREET, J., the Master's order was set aside, but the defendant was given leave, upon payment of costs, to file a further affidavit, and have the motion reheard.]

CARTWRIGHT, MASTER.

JUNE 8TH, 1903.

CHAMBERS.

CAMPBELL v. BAKER.

Staying Proceedings—Former Action Pending—Identity of Matters in Controversy—Consent Judgment.

On the 7th January, 1901, an action was commenced by the present plaintiff against Croil and McCullough to recover an amount alleged to be due by them on certain mortgages. The statement of claim was delivered on 20th February. On the same day an agreement was made by the defendants in that action to sell to the Bakers, who were defendants in the present action, so much of the lands embraced in the first action as were sought to be recovered and otherwise dealt with in the present action. To this agreement the plaintiff assented on certain terms not necessary to set out. This first

action being at issue on 12th October, 1901, the parties executed an agreement for a consent judgment for plaintiff for \$3,750 without costs, and providing that all the properties mentioned in the statement of claim should be sold by the plaintiff and defendant Croil, and the proceeds divided equally between plaintiff and defendants.

On the 25th October, 1901, such a judgment was accordingly pronounced, and the lands were duly offered for sale, and bought by Croil. The sale was conducted by the Master at Cornwall, as provided by the judgment, and on 15th March, 1902, he made his report, finding a certain amount due. The defendant Croil appealed therefrom; and on the 10th October, 1902, an order was made referring back the report, and directing the Master to report as to title and to ascertain "what amount, if any, is due by the said John H. Croil to the plaintiff upon an adjustment of all the matters in question between the parties," and directing that upon payment within 20 days thereafter of such amount a vesting order already made should be handed to said Croil.

The Master made his further report on 17th February, 1903, finding a balance of \$1,024.85 due by Croil and McCullough to plaintiff. From this report the defendants again appealed, and on 2nd April last an order was made reducing the amount due by defendants to \$898.85 and extending time for payment until 15th June instant.

From this order the defendants were appealing to the Court of Appeal, and a bond for security for costs had been filed and had not been disallowed. The present action was commenced on 5th May, 1903, to recover possession of the parcel sold to the Bakers under the agreement of 20th February, 1901. The statement of claim was delivered on 18th May. Thereupon the defendants moved to stay the action, as provided by sub-sec. (9) of sec. 57 of the Judicature Act. The cause was at issue and notice of trial had been given.

J. H. Moss, for Croil.

William Johnston, for defendants the Bakers, supported the motion.

C. H. Cline, Cornwall, for plaintiff, shewed cause. He urged that this action was only to recover the amount due by Croil and to acquire possession to prevent irreparable injury to the plaintiff. He offered to consent to the motion if defendants would give any substantial security.

THE MASTER.—I am of opinion that the motion must prevail. The whole matter now in controversy between the

parties is before the Court in the original action. Until it has been finally determined, any other proceeding would seem to be vexatious if not an abuse of the process of the Court. The very absolute character of a consent order or judgment was pointed out and acted on by the Court of Appeal in *Canadian Pacific R. W. Co. and City of Toronto*, 27 A. C. 54 at p. 63, where the order of Armour, C.J., giving certain directions to the referee, was reversed, as being ultra vires. This second action is a distinct violation of the consent judgment. Any good that could possibly result from it can be far more quickly had under Rule 827. By the provisions of that Rule any security to which plaintiff is entitled will undoubtedly be given him as a term of stay of execution if the defendants make default on the 15th June. It certainly seems to me that in any case the plaintiff was bound to wait until it was shewn that defendants were going to make default. They may be, they say they are, able to pay the whole \$100,000 into Court to abide the result of the appeal, if so ordered by the Court.

I think, therefore, that for these three reasons the present action should be stayed:—

1st. Because it is a breach of the agreement in pursuance of which the consent judgment was made.

2nd. Because the time for payment, as finally fixed, of the amount due by defendants, has not yet arrived.

3rd. Because any relief the plaintiff could get thereby would be more effectually obtained by application to the Court of Appeal under sub-sec. (2) of Rule 827.

The action should be stayed at least until 16th June, with liberty to plaintiff to apply for leave to proceed, if so advised. The costs of this motion should be to the defendants in the event.

CARTWRIGHT, MASTER.

JUNE 9TH, 1906.

CHAMBERS.

LAKE SUPERIOR POWER CO. v. HUSSEY.

Consolidation of Actions—Refusal to Direct Stay—Direction to Proceed together for Trial.

Motion by defendant to stay the action until the determination of a similar action by the same plaintiffs against Martha Baldwin, on the ground that the validity of a certain tax sale is the only question to be decided in each action.

W. E. Middleton, for defendant.

R. U. McPherson, for plaintiffs.

THE MASTER.—The actions were commenced just a year. They are now at issue and ready for trial at the ensuing assizes at Sault Ste. Marie. The defences, though generally similar, are not identical. I have looked at the case of *Township of Tilbury West v. Township of Romney*, P. R. 242, and the cases cited in the judgment of Mr. Justice Street, which seem very applicable to the present motion. I cannot see any authority which would justify me in granting the order except upon the terms that the defendant in this case would agree to be bound by the result in the other action. Even then I do not think that plaintiffs could be obliged to accept any such limitation of their right to proceed with both these actions, as a matter of precaution. Unexpected and unforeseen delays might easily occur, e.g., death of defendant or abatement or inevitable delay from any other cause. The only order that can be made, in my opinion, is . . . that plaintiffs should enter the two actions together, so that the trial Judge can direct that the defence in the first action be held to have been taken in the other, so far as applicable. . . . Costs to plaintiffs in any event.

MEREDITH, J.

MAY 29TH, 1903.

CHAMBERS.

BLACKWELL v. BLACKWELL.

Statement of Claim—Non-conformity with Writ of Summons—Amendment—Practice.

Appeal by defendants from order of Master in Chambers, No. 411, refusing to strike out certain paragraphs of the statement of claim.

M. Wilkins, Arthur, for appellants.

J. H. Spence, for plaintiff.

MEREDITH, J., ordered that, upon plaintiff consenting to make certain amendments to the statement of claim, the appeal should be dismissed, and costs should be in the cause. In default of such amendment, the appeal should be allowed with costs and the paragraphs stricken out as asked.

MACLAREN, J.A.

JUNE 8TH, 1903

C.A.—CHAMBERS.

CRAIG v. SHAW.

Court of Appeal—Leave to Appeal—Special Reasons—Sale of Goods—Action for Price—Place of Delivery—Inspection—Defect Quality.

Motion by defendants for leave to appeal from order of a Divisional Court, ante 449, affirming judgment of the Judge.

F. E. Hodgins, K.C., for applicants.

R. J. McLaughlin, K.C., for plaintiffs.

MACLAREN, J.A., held that there were not sufficient special reasons for treating the case as exceptional and granting leave to appeal. Motion dismissed with costs.

JUNE 9TH, 1903

DIVISIONAL COURT.

KELLY v. WILSON.

Chose in Action — Assignment of — Order for Payment of Money—Equitable Assignment of Fund—Existence of Fund—Finding of Fact.

Appeal by defendant Wilson from judgment of F. CONBRIDGE, C.J., in favour of plaintiff in action to recover \$310, the amount of an order given to plaintiff by defendant Aldous upon defendant Wilson, as follows: "Pay to Edward Kelly the sum of \$310 and charge same against sale of stock and business as arranged between us."

D. L. McCarthy, for defendant.

A. Weir, Sarnia, for plaintiff.

The judgment of the Court (BOYD, C., FERGUSON, MACMAHON, J.) was delivered by

BOYD, C.—It is conceded that the order to pay is in the nature of a good equitable assignment of the fund, if there was an existing fund out of which it was to come. That being so, in law, I think the finding of the Chief Justice on the facts, with his estimate of the witnesses, is one that ought not to be disturbed. Affirming the judgment on the facts, that on the law follows.

Appeal dismissed with costs.

ARTWRIGHT, MASTER.

JUNE 10TH, 1903.

CHAMBERS.

CONMEE v. LAKE SUPERIOR PRINTING CO.

Libel—Pleading—Statement of Defence—Fair Comment—Privileged Occasion—Public Interest.

Motion by plaintiff to strike out the 4th and 5th paragraphs of the amended statement of defence of defendant Russell, and the 3rd paragraph of the amended statement of defence of defendant company, or in the alternative for a further and better statement of the nature of the defences, or for particulars of the paragraphs. The action was for libel.

N. W. Rowell, K.C., for plaintiff.

C. A. Moss, for defendants.

THE MASTER.—The grounds of objection are set out in the notice of motion. The main ground was, that, if the defence set up was "fair comment," the pleadings should be in the form ordered in *Crow's Nest Pass Co. v. Bell*, 4 O. L. R. 666. That, however, was a case in which there could not be any claim of privilege.

On the other hand, it was argued that the defendants did not intend to plead justification, and were not obliged to do so—that what they desired to set up was, that these statements were made on a privileged occasion and in good faith and as matters that were spoken of freely and generally at the time; that the plaintiff now occupies a prominent position, as he himself sets out in his statement of claim, being now and having been for the past 14 years a member of the Legislative Assembly; that by his own statements and justification of his conduct he had openly challenged and invited criticism and inquiry; and that the defendants were only acting within their rights and in the public interest in asking explanations of certain alleged actions of his which seemed inconsistent on their face with his self praise; that these criticisms were such as are usual in an electoral campaign, and are not taken too seriously, so that plaintiff was not damaged to any appreciable extent thereby.

In *Odgers on Libel*, 3rd Eng. ed., pp. 47 and 48, instances will be found of similar published statements about public men and matters, and the remarks of Cockburn, C.J., and of Lord Herschell in some of these cases. The former has pointed out how the rights of the press have been enlarged in

recent years and how necessary it is that they should not restricted unduly.

I have compared the pleadings in their amended form now on the record with those in *Dryden v. Smith*, 17 P. 505, which is a similar case. Equally strong statements alleged facts are to be found there set out in the 5th paragraph of the statement of defence, but it was never objected there that the defendant must justify these facts before could be allowed to plead fair comment.

I may be wrong in the view I have taken of these pleadings in the limited time at my disposal, but I am of opinion that the defences here are really similar to those in *Dryden v. Smith*. To the judgments in that case I would refer for reasons in holding that this motion should be dismissed so far as striking out or directing further amendments of the pleadings is concerned. As to the particulars asked for, I don't think they are necessary. The statements of the charges and counter-charges are nothing more than allegations of mitigation of damage, as shewing that no one would be likely to pay any great attention to them. . . .

I now therefore adopt what I said (p. 510) in *Dryden v. Smith*, and direct the motion to be dismissed. I think the pleadings might have been made clearer, so that the costs might be in the cause. . . .

After further consideration, I still think that the defendants are entitled to plead as they have done the defences which they rely. Whether these defences will be considered sufficient by the Court and jury at the trial is not a matter which can be inquired into in Chambers.

JUNE 10TH, 1903.

DIVISIONAL COURT.

CORNELL v. HOURIGAN.

Mortgage—Covenant—Sale of Equity of Redemption—Agreement to Look to Purchaser—Novation—Neglect of Assignee of Mortgage—Insurance—Trusts—Parol Evidence.

Appeal by defendants from judgment of BRITTON, J., ante 4, in favour of plaintiff in an action on the covenant contained in a mortgage deed.

G. Lynch-Staunton, K.C., for defendants.

D. O. Cameron, for plaintiff.

THE COURT (BOYD, C., FERGUSON, J., MACMAHON, J.) held that in equity the evidence was ample to sustain the case.

tion that there was a release agreed upon and acted on by both parties—in relinquishing and in acquiring the property which precluded the legal enforcement of the covenant, because of the countervailing equities based upon this sufficiently proved arrangement. *Williams v. Yeomans*, L. R. 10, 184, referred to. Appeal allowed with costs and action dismissed with costs.

JUNE 10TH, 1903.

DIVISIONAL COURT.

HARVEY v. MCPHERSON.

Division Courts—Jurisdiction—Splitting Cause of Action—Promissory Notes—Consolidation of Claim in Proof against Insolvent Estate.

Appeal by plaintiff from judgment of 1st Division Court county of Wentworth (2 O. W. R. 251) dismissing the action because brought for only a part of plaintiff's claim, contrary to sec. 79 of the Division Courts Act.

A. McLean Macdonell, for plaintiff.

C. A. Moss, for defendant.

THE COURT (BOYD, C., FERGUSON, J., MACMAHON, J.) held that the promissory note sued on (dated 15th November, 1896) was when due a single cause of action, and remained such and might be sued upon as such in a Division Court. That it was relied on to shew that it was but a fraction of a cause of action, was, that the debtors, become insolvent, made an assignment for creditors, and that the holders proved their claim upon this and other notes, and in respect of goods and merchandize for which they did not hold notes, before the assignee, for the lump sum of £544.41, upon which was paid a dividend of 25 per cent. The holders had no security for their claim. The notes of insolvents were not such security, and the notes could not be used as vouchers. This massing of the whole indebtedness for the purpose of proving in insolvency did not merge the whole into such unity that it became an unseverable claim. As against the debtors there was no change in liability upon the several notes as separate causes of action, and that happened on account of the insolvency was, that 25 per cent. was paid and was to be credited on each note. *Attwood v. Taylor*, 1 M. & G. 307, *Brunskill v. Powell*, 19 L. J. 362, *Franklin v. Owen*, 15 C. L. T. Occ. N. 158, 185, and *Richardson v. Martin*, 23 W. R. 93, referred to.

Appeal allowed with costs and judgment to be entered for plaintiff with costs.

JUNE 11TH, 1902

DIVISIONAL COURT.

RE DENISON, REX v. CASE.

Mandamus—Police Magistrate—Sentence for Criminal Offence—Personation of Voter—Referendum—Status of Applicant for Mandamus—Informant—Liquor Act, 1902.

Appeal by E. J. Ritchie, private prosecutor, from order BRITTON, J., ante 152, dismissing an application by the appellant for a mandamus to the police magistrate for the chief of Toronto to impose upon Adam S. Case the sentence prescribed by sec. 167 of the Ontario Election Act, or, in the alternative, for an order of this Court imposing such penalty, under sec. 889 of the Criminal Code. Case was convicted by the magistrate for personation at the Referendum vote under the Ontario Liquor Act, 1902, and was sentenced to pay a fine of \$50 and costs or to imprisonment for six months at hard labour. The prosecutor sought to have a fine of \$400 and imprisonment for one year imposed. An information was laid by Sturgeon Stewart before the deputy returning officer, E. J. Ritchie, against E. A. Taylor (which was the name given by Case when he asked for a ballot), on the polling day, and before Case had left the polling place, charging him with personating James Brophy. Ritchie, on this information, issued his warrant for the apprehension of Andrew E. Taylor, and Case was thereupon apprehended and brought before the magistrate. On the 5th December, upon Case being brought up before the magistrate for trial, Ritchie laid an information against Case for an attempt to personate, and Case was tried and convicted as above.

A. Mills and W. E. Raney, for appellant.

J. Haverson, K.C., for defendants.

THE COURT (BOYD, C., FERGUSON, J., MACMAHON, J.) held that under secs. 4, 5, and 6 of the Election Act, R. S. O. ch. 10, the information which gave the magistrate jurisdiction was that laid by Stewart, and without such information the magistrate was powerless; and Stewart being the informant, he was the only person who could apply for a mandamus, and Ritchie was without any locus standi in the Court. Appeal dismissed. No costs.

JUNE 11TH, 1903.

DIVISIONAL COURT.

RE TAGGART v. BENNETT.

*County Court Appeal—Right of Appeal—Final Order—Refusal to Vary
Minutes of Judgment.*

Appeal by plaintiff from order of BRITTON, J., 2 O. W. R. 9, dismissing a motion by plaintiff for a mandamus to compel the Judge of the County Court of Middlesex to certify the proceedings in this case, pursuant to sec. 55 of the County Courts Act, so as to permit an appeal to a Divisional Court against an order of the Judge dismissing an application to vary the minutes of the judgment in this action as to costs.

W. H. Bartram, London, for appellant.

No one contra.

The judgment of the Court (BOYD, C., FERGUSON, J., and MACMAHON, J.) was delivered by

BOYD, C.—This is a matter interlocutory, from which no appeal lies under R. S. O. ch. 55, sec. 52. While provision is made for appealing from a decision of the Judge made under powers conferred by the Rules of Court (e.g., as to settling minutes), yet the last part of the section controls all the rest, and it is only in case the decision is in its nature final that appeal lies.

This is a mere interlocutory ruling, which will issue in a final judgment, and from that judgment of the Court (if it is appealable) the appeal lies, and not from a proceeding which is but a step towards that judgment.

No order.

JUNE 11TH, 1903.

DIVISIONAL COURT.

AHRENS v. TANNERS' ASSOCIATION.

*Discovery—Examination of Officer of Defendant Association—Agent
—Association of Incorporated Companies and Partnerships.*

Appeal by defendants from order of MEREDITH, C.J., ante 479, affirming order of Master in Chambers, ante 464,

directing Mr. D. A. Burns to attend for examination for discovery as an officer of defendants.

W. N. Tilley, for defendants.

C. A. Moss, for plaintiff.

The judgment of the Court (BOYD, C., FERGUSON, J. MACMAHON, J.) was delivered by

BOYD, C.—The statement of claim asserts that Mr. Burns was appointed "executive officer" of the association sued as the Tanners' Association, paragraph 5, but, according to the circular and the fact, he is only an agent. It appears that this association is a partnership or unincorporated company, consisting of a number of dealers in leather—in effect a syndicate made up of mixed partnerships and incorporated trading concerns—one of whom, the Breithaupt Leather Co., Limited, defends, because "sued as the Tanners' Association."

This company takes up the defence as being one of the constituents of the association defendant. This company can have officers within the meaning of the Rule as to discovery, but such officers the defendants cannot have as being a mere partnership. It does not follow from this method of defence that Burns, the agent of the association, becomes an officer of the Breithaupt Company, or is to be so regarded for the purposes of preliminary discovery. There is nothing to shew or to prove that he is an officer of the defendants or of the Breithaupt Company, who defend as for the Tanners' Association. If the whole body of the syndicate came in *seriatim* as defendants, like the Breithaupt Company, it would not make Burns an officer of each of them that happened to be incorporated so as to be examinable for discovery, and he certainly would not be such an officer as to any of the syndicate who are mere partnerships. In brief, the whole syndicate aggregated becomes the defendant, a mere association, which has an agent, Burns—but this Burns is not an officer of each member of the syndicate who is a corporate body.

This case seems to be unique, and the policy of the Court is not to liberalize the construction to be put upon this Rule. See *Morrison v. Grand Trunk R. W. Co.*, 5 O. L. R. 48, 1 O. W. R. 758; and, in my opinion, the order should be vacated—costs in cause to defendants.

OSLER, J.A.

JUNE 11TH, 1903.

C.A.—CHAMBERS.

RE LENNOX PROVINCIAL ELECTION.

*Parliamentary Elections—Bribery—Summonses to Persons Charged—
Directions as to Trial.*

Application for summonses against various persons charged with bribery at the election .

E. Bristol, for applicants.

OSLER, J.A.—The applicants, if so advised, may take out summons against each person charged, and, as there are at present two Judges on the rota of election Judges available for the purpose of trying them, they must be made returnable, as provided by sec. 188 (2) of the Election Act, before any Judge of the High Court holding a sittings of that Court at Napanee for the trial of civil or criminal causes.

JUNE 13TH, 1903.

DIVISIONAL COURT.

PEARCE v. ELWELL.

*Master and Servant — Injury to Servant — Factory — Machinery—
Absence of Guard—Defective Guard—Findings of Jury—General
Verdict—Pleading—Notice of Accident.*

Plaintiff was a young woman employed by defendants in their laundry to work at a machine used for mangling and wringing clothes. While at work at this machine one of her hands was caught between two rollers and she was injured. She brought this action to recover damages for her injuries. The statutory notice of accident stated that it was caused by the absence of a guard to the machine. The statement of defendant charged that the machine was a dangerous one, and was not properly guarded. Defendants alleged that it was properly guarded, and that the accident arose from plaintiff's carelessness.

The action was tried before BOYD, C., and a jury, at Hamilton.

Plaintiff and other witnesses swore there was no guard at the time of the accident. Other witnesses swore there was a guard. The machine with the guard on it was exhibited to the jury, and counsel for plaintiff contended that, even had the guard been on, it was not a proper or sufficient guard, and that it might easily have been made effectual without

impairing the usefulness of the machine. Witnesses for the defence swore that the machine was a modern one, and that the guard had been used on it as intended by the makers of it, and it was not shewn that any other machine of the kind had a better guard.

The Chancellor left the case to the jury without any written questions, instructing them that upon the evidence they might find either that the guard was or was not on at the time of the accident, and he also expressly left to them the question whether the guard was a sufficient one, if it was on at the time of the accident.

No objection was taken to the charge, and the jury found for the plaintiff and assessed the damages at \$422.80. The jury found specially that the guard was insufficient. Judgment was entered for plaintiff for the damages found.

Defendants moved to set aside the verdict and for judgment in their favour, upon the ground that there was no evidence to support the finding, or for a new trial, upon the ground that the verdict was against the evidence.

J. W. Nesbitt, K.C., for defendants.

J. G. Farmer, Hamilton, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J. and STREET, J., BRITTON, J.) was delivered by

STREET, J.—The issue as to whether the machine was properly guarded appears to be raised distinctly upon the pleadings, and to have been one of the matters upon which evidence was given on both sides at the trial. It was expressly submitted to the jury without objection, and I can see no reason . . . for holding that there should be a new trial because the jury may have based their verdict upon that ground.

The question of the contributory negligence of defendant was also left to the jury with proper instructions as to its effect. In the sealed verdict which they handed in, after stating that the guard was not a proper one, they say they "consider that the plaintiff is entitled" to recover the damages which they assess. This must be treated as a general verdict for plaintiff . . . and a finding in plaintiff's favour upon the question of contributory negligence is involved in it. . . .

Appeal dismissed with costs.

JUNE 13TH, 1903.

DIVISIONAL COURT:

LIVINGSTON v. COUNSELL.

Trusts and Trustees—Account—Contract—Parties.

Appeal by plaintiff from judgment of MEREDITH, C.J., the trial at Brantford, dismissing the action with costs, without prejudice to a further action being brought by the proper parties. The plaintiff is the wife of one W. C. Livingston, and the action was brought by her against Charlotte Counsell, executrix of the will of C. M. Counsell, deceased, claiming an account and payment of money. Thomas C. Livingston, the father of plaintiff's husband, was the owner of certain property in Winnipeg, subject to certain mortgages. On 27th October, 1897, an agreement under seal was entered into between him and the late C. M. Counsell, which provided that Counsell should advance \$15,000 to him upon the security of a mortgage of his equity of redemption, and should discount for him the note of Thomas C. Livingston, endorsed by W. C. Livingston and plaintiff for \$3,500, at three months, which note should be renewed from time to time for four years; that Counsell should forthwith be put in possession of the property and should collect the rents of it, and should apply them in payment of interest on the prior mortgages and his own mortgage, and of taxes, etc., and in payment to himself of a remuneration of \$10 a month, and should pay any surplus to plaintiff. The advance was made and the note discounted, and plaintiff had to pay the note. Counsell went into possession of the property and collected the rents. The plaintiff alleged that Counsell or the defendant had not paid over the surplus over and above the sums authorized to be deducted from the rents, and asked for an account. The trial Judge ruled that Thomas C. Livingston was a necessary party to the action, but plaintiff declined to amend by adding him, and the action was thereupon dismissed as above.

A. B. Aylesworth, K.C., for plaintiff.

J. L. Counsell, Hamilton, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., BRETT, J., BRITTON, J.) was delivered by

STREET, J.—Counsell became a trustee of the surplus funds for plaintiff under the agreement, but upon the facts of the case the trust would come to an end when the object of it,

which was the securing of plaintiff against loss, had been attained, and Livingston himself would then become beneficially entitled again to the surplus rents. There is plain a sufficient interest in plaintiff to entitle her to maintain the action: *Fletcher v. Fletcher*, 4 Hare 67, 75, 78; *Gandy v. Gandy*, 30 Ch. D. 57, 54 L. J. Ch. N. S. 1154. But it is equally clear that defendant is entitled to have T. C. Livingston, with whom testator entered into the covenant to pay plaintiff, made a party to the action in order that he may be bound by the proceedings: *Daniell's Ch. Prac.*, 7th ed., p. 163, 172; *Mitford's Eq. Pldg.*, 5th ed., p. 164. . . . Order made that, upon payment on or before 15th September next of the costs of the trial and of the appeal, plaintiff have leave to amend by adding T. C. Livingston as a defendant with proper amendments to the proceedings, to be made before 1st October next; and that, in default of such payment or such amendments, the action and appeal be dismissed both with costs, and the plaintiff's rights finally barred.

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BARTWRIGHT, MASTER.

JUNE 15TH, 1903.

CHAMBERS.

HOLME v. MCGILLIVRAY.

*Judgment Debtor—Examination of Transferee—Evidence of Transfer
—Depositions—Affidavits.*

Motion by plaintiffs for an order under Rule 903 for the examination of the defendant's wife as a transferee of property of defendant, against whom plaintiffs had a judgment for the recovery of money.

A. R. Clute, for plaintiffs.

R. S. Waldie, for defendant and wife.

THE MASTER.—The material consists of: (1) the usual affidavit of a member of plaintiffs' firm and the examination of the defendant as a judgment debtor; (2) affidavits of defendant and wife in answer; (3) affidavit of R. H. Holme in reply; (4) affidavit of D. L. Robb filed by defendant.

The plaintiffs also wished to use a copy of the depositions of the defendant when examined as a witness last April in an action brought by the above named Robb against one Samis.

This Mr. Waldie objected, relying on the observations of the learned Judge, J.A., in *Ray v. Port Arthur, Duluth, and Western R. Co.*, ante 345, 347. I think the objection must prevail, and that this evidence cannot be looked at on this motion.

The depositions of the defendant . . . are amazing, and the Court will certainly consider them incredible until some case has been found to have accepted them. He states that, though he manages the whole business of McGillivray & Co. (which he says is his wife), and signs cheques in his own name, and looks after business for other incorporated companies, yet he

gets nothing for any of these services, even working for the companies, as he says himself, "for love."

Now, the importance of this is, that Mr. Holme in his second affidavit states that Mr. Robb had told him that the defendant had got \$800 due him for services transferred to his wife, instead of himself. The affidavits of defendant and his wife may be strictly correct, but they are identical in language, and do not refer in any way to this point. The only answer they have made is by filing an affidavit of Mr. Robb. . . . He . . . admits that defendant's wife "subscribed for \$800 stock of the Daisy Petroleum Company which was issued to her as the consideration for certain services rendered the company by the defendant, acting, I believe, for her." How this is to be reconciled with defendant's statements, I do not attempt to consider. One thing seems clear. If he rendered the services, as Mr. Robb states, and he was not being paid anything by his wife, the transfer of the \$800 stock to the wife must have been purely voluntary. Mr. Robb carefully refrains from saying that Mrs. McGillivray paid anything for the stock.

Under these circumstances, and looking at the undisputed facts, there can be no question that plaintiffs are entitled to the order.

[Gowans v. Barnet, 12 P. R. at p. 335, referred to.]

STREET, J.

JUNE 15TH, 1903

CHAMBERS.

RE BRAY.

*Will—Construction—Devise—"Heirs"—Estate in Fee Simple—"Or"—
—"And"—Condition in Terrorem.*

Motion by Frances Bray, widow of Joseph Bray, for an order declaring the construction of his will, so far as his real estate was concerned, and whether an annuity given by the will was a charge on the real estate if the personalty should be insufficient.

Joseph Bray died on 17th January, 1902, leaving a will dated on the same day, which was admitted to probate. He bequeathed to his mother an annuity of \$250, and as to the remainder of his estate his will was as follows: "To my wife or to her heirs, as long as she remains my widow, all the remainder of my real and personal estate; and on her death c

marrying again, in case of no heirs, the property is to
 go to my brothers and sisters equally."

W. M. Douglas, K.C., for the widow.

F. W. Harcourt, for the infant.

G. E. Bray, Listowel, for the executor.

G. F. Macdonnell, for brothers and sisters of the testator.

STREET, J.—There is no authority for construing the
 word "heirs" in the devise as "children," without a much
 larger context than is found here; "heirs" must receive its
 technical construction, and the word "or" must be read "and,"
 with the result that the widow takes an estate in fee simple;
 the provision as to her marrying again must be treated as
 void in terrorem, and the devise over to the brothers and
 sisters, being a remainder after a fee simple, and not an ex-
 ceptory devise, fails. The annuity to the mother is not
 charged upon the real estate, but is to be paid out of the per-
 sonal property.

Order accordingly. The widow to pay her own costs and
 those of the infant and of the brothers and sisters of the tes-
 tator. The executor to have his costs between solicitor and
 client out of the personal estate.

TWRIGHT, MASTER.

JUNE 17TH, 1903.

CHAMBERS.

LAWRENCE v. SMITH.

*—Refusal of Motion for Summary Judgment—Cross-examination
 on Affidavits—Substitution as Discovery.*

Motion for summary judgment under Rule 603.

H. M. Mowat, K.C., for plaintiff.

V. D. McPherson, for defendant.

THE MASTER.—At the argument I held that the motion
 did not succeed in the present position of the authorities.
 I reserved the question of costs until I could examine
 the material. Having done so, I think the costs should be
 paid by the defendant in any event. See Warner v. Bowlby, 9 Times
 13.

The cross-examinations on this motion can stand as the
 examinations for discovery. They seem to cover the whole
 ground on both sides.

CARTWRIGHT, MASTER.

JUNE 17TH, 18

CHAMBERS.

MARSH v. McKAY.

*Security for Costs—Defamation—Unmarried Woman—Trivial
F frivolous Action—Defence on Merits.*

Motion by defendant for security for costs under R. S. ch. 68, sec. 5, in an action brought by an unmarried woman against the publisher of a newspaper. It was admitted that the plaintiff was not good for costs.

S. B. Woods, for defendant.

T. H. Lloyd, Newmarket, for plaintiff.

THE MASTER.—The action is certainly not trivial or frivolous. Of the words complained of it cannot, in my opinion, be said that they are not capable of being used in the sense attributed to them in plaintiff's affidavit. The only question therefore, is: Does defendant shew a good defence on the merits?

Here there can neither be a denial of publication nor a claim of privilege. Nor is there any possibility of a justification. . . . The motion fails.

Swain v. Mail Printing Co., 16 P. R. 135, Lennox v. Mail Printing Co., ib. 493, and Paladino v. Gustin, 17 P. R. 1, referred to.

CARTWRIGHT, MASTER.

JUNE 17TH, 18

CHAMBERS.

EVANS v. CLANCY.

Attachment of Debts—Assignment of Fund Garnished—Money Paid on Contingency—Validity of Assignment—Ascertainment of Assets before Attachment.

Motion by judgment creditor to make absolute an attachment order.

It was shewn that, prior to the service on the Ontario Jockey Club, the garnishees, the judgment debtor had assigned to the claimant all "prizes, stakes, purses, and monies (if any) to which he should become entitled from the Ontario Jockey Club for winnings by any or all of (several horses) at the race meeting commencing 23rd May." This assignment dated 16th May, and was received by the secretary of the club on 22nd May or thereabouts.

The attaching order was made on the 3rd June and served on the 5th June.

G. Grant, for the judgment creditor, contended that the assignment was void as being of property that was not in existence, and which might never come into existence.

W. N. Ferguson, for the claimant, contended that if the assignment would not have been good at law, it was a good equitable assignment.

A. W. Ballantyne, for the garnishees.

No one appeared for the judgment debtor.

THE MASTER.—In *In re Clarke, Coombe v. Carter*, 36 Ch. D. 348 (followed and approved by the House of Lords in *Tailby v. Official Receiver*, 13 App. Cas. 523) the Court of Appeal, without deciding that a general assignment of all future-acquired property could take effect, held that an assignment such as the present was good and could be enforced whenever the property came into existence and could be identified.

In the present case everything sought to be garnished had come into existence and been clearly ascertained before the attaching order was made. . . . It would seem, therefore, that the right of the assignee had become vested before the plaintiff had even moved in the matter.

The order must be discharged with costs.

JUNE 17TH, 1903.

DIVISIONAL COURT.

REX v. COULTER.

Criminal Law—Procuring Person to Commit Personation—Liquor Act, 1902—Ontario Election Act—Summary Conviction—Validity.

Motion by defendant to make absolute a rule nisi quashing his conviction for an offence against sec. 168 of the Ontario Election Act by procuring one Rayner to vote in the name of another person at the voting upon the Ontario Liquor Act, 1902.

The motion was heard by BOYD, C., FERGUSON, J., MACRAE, J.

J. Haverson, K.C., for defendant.

J. R. Cartwright, K.C., for the Crown.

BOYD, C.—The provisions of the Ontario Election Act as to corrupt practices are made to apply to the taking of the vote upon the question "Are you in favour of bringing into force the Liquor Act, 1902?" See sec. 91 of 2 Edw. VII. ch. 33 (O.)

The offence here charged and convicted of is, that defendant did on 4th December, 1902, induce and procure another person (Rayner) to vote at a polling place in the city of Toronto for the taking of that vote before one Pim, deputy returning officer thereat, defendant well knowing that Rayner had no right to vote at the said time and place upon the said question.

The justification for the conviction is under sec. 168 of the Election Act, R. S. O. ch. 9, by which every person who induces or procures another to vote at an election, knowing that the other has no right to vote thereat, shall be guilty of a corrupt practice.

Reading this mutatis mutandis, as directed by sec. 91 of the Act of 1902, it will be that a person who procures another to vote upon the said question, knowing he has no right to vote thereon, shall be guilty, etc.

As I understand the objection, the conviction is argued to be bad because it is said that Rayner had a right to vote upon the question, though not a right to vote at the particular polling place, and therefore (it is said) this wrongdoing is not hit by the statute.

Examine, however, who has a right to vote upon the question. By the Act of 1902, sec. 2, "the persons entitled to vote upon the said question" are all whose names appear on the voters' lists. . . . as entitled to vote at a general election. . . . and whose names are duly entered on the poll books to be used for the purpose of voting under the Act.

Under sec. 10 different polling places are to be fixed by the returning officer for each subdivision of the municipality, and by sec. 20 a poll book for each subdivision containing the names of all persons entitled to vote therein shall be furnished for every polling place.

Section 24 provides for the appointment of a deputy returning officer for each polling subdivision, who is to open and hold the poll and to record in the voters' list in the poll book the particulars relating to electors voting at the polling places as by the Act directed.

By sec. 36 it is enacted that no person shall be admitted to vote unless his name appears on the list in the poll book (i.e., at each subdivision).

Section 38 indicates how the poll books are to be made up by the clerk of the peace, i.e., by entering in the poll book for each subdivision from the proper list of voters the name of every person appearing therefrom to be entitled to vote within that subdivision for which the said poll book is required.

By sec. 47, in case the name of a person entitled to vote is entered on the list of voters for more than one polling subdivision, he shall vote only at the polling place for the subdivision in which he resides.

These and other like sections indicate that the person entitled to vote upon the question must have his name appear upon the voters' list to be used in the particular subdivision where he renders his vote, and without this he is not entitled to vote and is not to be admitted to vote upon the question.

That is what is struck at by sec. 168; the man who brings another to the polls, and induces him to vote at a polling place where he has no right to vote, the former knowing that the latter has no such right, is guilty of a corrupt practice.

MACMAHON, J., gave reasons in writing for the same conclusion.

FERGUSON, J., also concurred.

Rule nisi discharged with costs.

TWRIGHT, MASTER.

JUNE 18TH, 1903.

CHAMBERS.

NORTHERN ELEVATOR CO. v. NORTH-WEST
TRANSPORTATION CO.

Costs—Compliance with Order for—Renewal of Stay of Proceedings—Payment into Court—Notice of—Effect as to Time for Delivering Defence—Rules 1204, 1207.

Motion by defendants to set aside the noting of the pleadings as closed for default of defence.

The statement of defence was due on the 9th June. On the previous day defendants' solicitors, who resided at Sarnia, instructed their agent at Sault Ste. Marie, where the proceedings were being carried on, to issue on præcipe an order for costs, which the agent did. On the following day, the 9th, the plaintiffs complied with the order by paying

\$200 into Court. On the 10th June at 5.30 p.m. the plaintiffs notified defendants' solicitors that they had complied with the order. Defendants' solicitors at once telegraphed to their agent at Sault Ste. Marie to file a statement of defence which had been in his hands for a week awaiting instructions. The telegram was received at Sault Ste. Marie at 10.15 a.m. on 11th June. In the course of the forenoon the agent for defendants' solicitors attended at the office of the local registrar to file the statement of defence, and found that the pleadings had been noted closed about an hour before.

C. A. Moss, for defendants.

W. E. Middleton, for plaintiffs, contended that Rule 1207 must govern, and that as soon as security was given the order was removed.

THE MASTER.—I think the motion must be allowed. I read the Rules applicable to this question, as soon as an order was issued on the 8th, a stay took place. Service of notice of payment into Court was not made until after 4 p.m. on the 10th, which was only equivalent to service on the 11th. If I were obliged to take that position, I would hold that the defendants had all the 12th on which to file their defence. In any rate plaintiffs acted prematurely in noting the pleadings closed at 10.10 a.m. on the 11th. To hold otherwise would render nugatory the direction in Rule 1207 requiring service of notice of payment into Court. The reason of this is plain. The party taking out the order is entitled to a reasonable time to ascertain if this has really been done or not, and been done correctly, as well as to proceed with due diligence in the action; and for that purpose he should at least have one day. Otherwise, and if the contention of plaintiffs is correct, a great deal of unnecessary hardship might constantly be occurring. It would be idle to direct service of a notice unless it was to have some effect.

The motion must be allowed, and plaintiffs must pay the costs of their experiment in any event.

MACMAHON, J.

JUNE 19TH, 1901.

TRIAL.

CARPENTER v. PEARSON.

Promissory Note—Action on — Defence — Misrepresentations — Sundry Transactions—Margins—Absence of Fraud.

Action to recover \$1,446.58, balance due on a promissory note made by defendant, dated 15th May, 1901, for \$1,446.58.

to plaintiffs or order one month after date. The
 (Carpenter & Son) were stock and grain brokers
 onto, and they alleged that they were, at the time the
 transactions leading up to the giving of the note were entered
 as agents for F. L. Camp & Co., who carried on a
 large business in Buffalo up to the 30th April, 1901,
 they failed. The defence was that defendant gave
 a number of orders to purchase and sell certain
 of stocks and bushels of grain, and plaintiffs informed
 that they had purchased and sold in accordance with
 orders; that in April, 1901, plaintiffs reported that in
 transactions which were then outstanding there had been
 loss, and that a large sum of money was necessary to
 begin the transactions; that defendant, relying on such
 representations, gave the note in question as a security for
 in respect of such transactions, and not as an acknow-
 ledgment of any definite indebtedness to plaintiffs; that he
 subsequently discovered that the representations of plaintiffs
 in the transactions were actually made, were not true, and
 he demanded back his note. He now counterclaimed
 delivery up of the note and a return of moneys paid, etc.

Lynch-Staunton, K.C., for plaintiffs.

R. Smyth, for defendant.

MAHON, J., held, upon the evidence, that Camp & Co.
 simply acting as plaintiffs' agents in receiving orders
 for purchase and sale of stocks; that the chief losses on
 defendant's account occurred in respect of a purchase of
 bushels of May wheat at 77 cents and a purchase of
 bushels of May wheat at 76½ cents, alleged to have
 been made on the 18th March, 1901, in respect of which
 plaintiffs, at the request of defendant, remitted to their agents
 large sums from time to time large sums in order to re-margin
 purchases; that, although the margins sent by plaintiffs
 to Camp & Co. were narrow, and seemed to suggest bucket-
 scalping, it could not be found on the evidence that
 plaintiffs were aware that Camp & Co. had bucketted the
 margins given for the wheat; that defendant, when he gave the
 note for the purchase of the grain, knew it would have to
 be remitted to a broker in Buffalo or Chicago, and he ad-
 mitted that it was on a "keep good" order, that is, that
 plaintiffs were to advance the money to keep the deal good as
 margins were called for. Therefore, that, unless it could
 be shown that plaintiffs did not believe the transactions were
 legitimate and valid, and so were guilty of fraud in remitting

on behalf of defendant the money to re-margin the deals, the defence failed. Judgment for plaintiffs for \$1,446.58 with interest and costs. Counterclaim dismissed without costs.

MACMAHON, J.

JUNE 19TH, 1902.

TRIAL.

McFADYEN v. McFADYEN.

Will—Action to Set aside—Want of Testamentary Capacity—Undue Influence—Findings of Judge—Costs out of Estate—Conduct of Testator.

Action for a declaration that a certain document dated 2nd September, 1902, purporting to be the last will of Angus McFadyen, of the township of Fenelon, farmer, should not be admitted to probate because of undue influence and want of testamentary capacity. This will gave the bulk of testator's property, worth about \$3,000, to his nephew, the defendant John S. McFadyen. The testator died on the 14th September, 1902, being then about 70 years old. His wife died in the preceding June. They had been married at least for 40 years. There were no children of the marriage. In 1884 the testator made a will giving his wife a life estate in all his property with a devise in remainder to his step-daughter.

G. H. Watson, K.C., and G. H. Hopkins, Lindsay, for the plaintiffs.

E. E. A. DuVernet and J. McSweyn, Lindsay, for the defendant John S. McFadyen.

H. O'Leary, Lindsay, for the other defendants.

MACMAHON, J., found upon the evidence that the testator, when he executed the will of September, 1902, had full testamentary capacity and understood the contents of the will and that he was not unduly influenced. But the conduct of the testator between the 21st and 29th August was somewhat strange, and that, coupled with the fact that he was an inmate of John S. McFadyen's house from the 29th August until his death, may have provoked the litigation, and it was not wholly unjustified. Costs of plaintiffs out of the estate. See *Orton v. Smith*, 3 P. & D. 23.

ET, J.

JUNE 20TH, 1903.

TRIAL.

MILLAN v. ORILLIA EXPORT LUMBER CO.

Action—Assignment of—Action by Assignee—Defective Notice of Assignment—Costs.

tion and counterclaim tried at Sault Ste. Marie. After going through the evidence the learned Judge dismissed the counterclaim and all of the plaintiff's claim, except his claim of \$184.93, being a sum of money owing by defendants to one Jas. Hurdle, which plaintiff alleged had been assigned to defendants, as to which judgment was reserved. The facts with reference to it were as follows. One Hollway was an inspector and salesman for defendants, and before 22nd July, 1902, he purchased from Hurdle a quantity of timber for defendants, and they were indebted to Hurdle in \$184.93 for it. On 22nd July, 1902, Hurdle made out his account against defendants in detail, and at the foot of it signed an order, addressed to defendants, "Pay to order of J. W. McMillan (plaintiff) above amount, \$184.93." Plaintiff a few days afterwards drew on defendants for the full amount of his claim in the present action, \$541.46, including the Hurdle

This draft was presented to defendants on 1st August, 1902, and they wrote on the same day to plaintiff to say that they could not reconcile the amount with their figures, and asked for a detailed statement. The plaintiff sent defendants a detailed statement, part of it being, "To amount of Jas. Hurdle, for lumber bought of Hollway, \$184.93." The statement was enclosed in a letter to defendants, dated 7th August, 1902, in which plaintiff said: "I attached a copy of the draft to draft and also an order which I had from Jas. Hurdle, from whom Mr. Hollway bought oak lumber to the amount of order given me." It appeared from the detailed statement of Hurdle against defendants that only \$124.80 of the amount was for oak lumber, the balance being for bass-lumber.

FREET, J., held, on the evidence, that, if Hurdle's order had ever been attached to the draft on defendants, it was not so at presentation, and the only notice to defendants of its existence was the mention of it in the account which defendants received from plaintiff in the letter of 7th August, 1902, in which there was no reference to it in that letter. The order amounts to an equitable assignment of Hurdle's claim against defendants: *Hall v. Prittie*, 17 A. R. 306; but plaintiff did not

before action give express notice in writing to defendants as to give himself the right to sue without joining Hurdle as a party. To enable the assignee to sue alone, the notice must be express notice, and it must be in writing; there should be nothing equivocal about it, nothing to leave the debtor in doubt as to whether the whole or only a part of the debt had been absolutely assigned. Therefore, this part of the action must also be dismissed, but without prejudice to the right of plaintiff to bring another action to recover the amount.

Two actions were brought upon the different causes of action which were considered at the trial and in the previous judgment. These actions were both begun in the District Court of Manitoulin. After issue joined they were consolidated by order and removed into the High Court and directed to be tried at Sault Ste. Marie, defendants agreeing to pay the additional witness fees incurred by change of venue from Gore Bay. One of the actions related only to the Hurdle debt. Defendants should recover their costs of defence if the only action had been one upon the Hurdle claim, and these costs should be taxed on the District Court scale. The costs of the motion to consolidate, etc., should be taxed on them on the High Court scale. Their witness fees should be no greater than if the action had been tried at Gore Bay, and plaintiff may set off the amount of the increased expense of taking his witnesses to Sault Ste. Marie. No order as to the costs of the other causes of action or the counterclaim.

THE
ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING JUNE 27TH, 1903.)

II. TORONTO, JULY 2, 1903. No. 25.

FWRIGHT, MASTER. JUNE 22ND, 1903.

CHAMBERS.

MCGREGOR v. JOHNSON.

*Commission—Evidence of Important Witness—Grounds for
Ordering Commission—Terms—Security for Costs.*

Motion by plaintiffs for order for commission to take
deposition of Myron R. Johnson at Waupaca, Wisconsin.

W. J. Elliott, for plaintiffs.

U. McPherson, for defendants, shewed cause and ob-
jected: (1) that the affidavits filed in support of the motion
were not sufficient under the cases; (2) that it was not shewn
that any attempts had been made to procure the attendance
of the witness; (3) that the witness would be at the trial on
defendants' behalf, as stated in the affidavit of their solicitor.

THE MASTER.—I consider that the 3rd objection disposes
of the first. In addition to this is the fact that in the state-
ment of claim it is alleged that the execution of the will in
question in the action "was obtained by the undue influence
of Myron R. Johnson, the son of the defendant Isabella
Johnson." . . . It may fairly be inferred that the wit-
ness was certainly present at the time of the execution and
that the execution of the will sought to be set aside.

The relationship of the witness to the principal defendant
is a sufficient answer to the second objection.

The third objection cannot prevail. It was stated at the
trial that the witness was in delicate health, and had
been in the winter in California on that account. No trial
could take place until the autumn. The plaintiffs should not
be obliged to take the risk of this witness being able to be
present at that time. . . . The statement of claim is
based upon the alleged undue influence of this witness. If
on examination the fact is not established, the action may
possibly be dropped; while if his evidence appears to

strengthen defendants' case, it may be considered by defendants good policy to make some settlement. . . .

Mr. McPherson asked to have it made a term of granting the commission that plaintiffs should give additional security. . . . This should not be done at present. It will be time enough to consider that point when notice of trial has been served, and the case is ready for hearing.

The order will provide for the execution of the commission during vacation.

Costs of motion in the cause.

JUNE 22ND, 19

DIVISIONAL COURT.

VIPOND v. GRIFFIN.

Sale of Goods—Rescission of Contract—Evidence of—Conduct of Parties — Appeal, Right of — Summary Trial of Interpleader Issue,

Appeal by defendant (execution creditor) from judgment of Judge of County Court of Lanark in favour of plaintiff (claimant) upon the summary trial of an interpleader issue as to a car load of apples sold by plaintiff to one Mitchell, and seized by the sheriff under defendant's execution against Mitchell, but claimed by plaintiff, upon the ground that the contract for sale between him and Mitchell had been rescinded.

J. A. Allan, Perth, for defendant.

C. H. Cline, Cornwall, for plaintiff, objected that no appeal lay and opposed the appeal on the merits.

The judgment of the Court (BOYD, C., FERGUSON, MACMAHON, J.) was delivered by

BOYD, C.—Having regard to the evidence and the conduct of the parties, there does not appear to be proof of a rescission of the contract to purchase the apples. The apples came to the possession of the purchaser Mitchell, and were advertised for sale by him, and some of them were sold. It was drawn upon for the price by the vendor after the alleged rescission of contract, the vendor saying in letter of 1st December, "we have not yet received notes to cover apples," and again on 17th December, "he (Mitchell) has had a lot of apples from us for which we have not received a dollar." Between the writing of these letters the vendor goes to Carlton Place, learns of Mitchell's flight, but makes no claim for the apples then in Mitchell's store house and in part sold.

the only thing against these letters and this conduct is statement of the vendor that over the telephone Mitchell had to accept the apples on 6th December.

The brother of the vendor, who heard what was said by vendor through the telephone to Mitchell, thus reports

... my brother answered: "It is very cold; take the and examine the fruit, report how many barrels No. 2, and write down your best offer on car;" and on cross-examination this, "Take the car—examine it—see how many apples are in car—and make us your best offer." The brother says that his manager was "to take the apples into" or "get it stored somewhere." He now interprets to mean a new bargain and storage on that footing. But brother does not corroborate about taking into store. The reports are consistent with the sale going on subject to the condition as to price because of alleged inferior quality of the apples.

The conduct and letters turn the scale against the vendor, and judgment should be reversed, and entered for the appellant with costs.

It is thought an appeal is open on this interpleader. The respondent has drawn imports only a consent to a summary disposition of the claim, not a consent to its being tried before the judge of the County Court as *persona designata*. The proceedings are all in the High Court, and both parties by their conduct contemplated and recognized a right of appeal from the Judge's decision, under Rule 1110.

JUNE 22ND, 1903.

REX v. MEYERS.

Municipal Corporations—By-law—Transient Traders—Conviction—Residence of less than Three Months—Penalty—Apportionment—Costs — Distress—Imprisonment—Uncertainty—Amendment—Butcher"—Municipal Act—Divisions and Headings.

Motion by defendant to make absolute a rule nisi to quash conviction under a transient traders' by-law of the village of Stouffville.

W. McCullough, for defendant.

W. E. Middleton and C. R. Fitch, Stouffville, for the Crown, as advocate and prosecutor.

The judgment of the Court (BOYD, C., FERGUSON, J., and MAHON, J.) was delivered by

BOYD, C.—This conviction is against a transient trader occupying premises in the village, who, not being entered on

the assessment roll, offered his goods for sale without having paid the license fee in that behalf imposed by by-law No. of the village of Stouffville. That by-law was passed in the year 1891, pursuant to the provisions of the Municipal Amendment Act of 1888 (51 Vict. ch. 28, sec. 23), empowering the municipality to fix a license fee to be paid by such transient traders before commencing to trade. That law of 1888 is practically carried into the existing municipal law, as found in R. S. O. ch. 223, sec. 583, clauses 31 and 33; and the by-law of 1891 is well founded thereon. The objections made to the non-appearance therein of the words "for temporary purposes" and "assessment roll of the then municipal year" are not pertinent, as they relate to the regulation of transient traders under clause 30 of sec. 583. This is under the clause which relates to the payment of a license fee before beginning operations. It does not appear needful to refer to or negative the provision of a later section, 1895, 58 Vict. ch. sec. 22, which gives an extensive meaning to the words "transient trader," and makes the term applicable to one who resided less than three months in the municipality before beginning business. The evidence in the present case shows a residence less than three months, and in fact but brief visits periodically and regularly to sell meat for a given time at a particular place in the village.

On the broad merits, therefore, the conviction is good.

The objection that the penalty of \$100 was not applicable under sec. 708 fails, because the application is otherwise provided for by the by-law on which the conviction proceeds.

The objection that the conviction and by-law are in excess of the statute because power of distress is given for both penalty and costs, and because of the commitment, in default of payment, to the common gaol, are not well taken. Power is given by sec. 702 (2) to pass by-laws for collecting penalties and costs by distress, and by sub-sec. (3) to punish by imprisonment after no distress or ineffective distress.

The objection as to the uncertainty of the offence in the conviction as to date, place, and meat sold may be answered from the facts in evidence, under the authority of 2 E. VII. ch. 12, sec. 15.

The large question is taken in the notice of motion, was not pressed so much as the other points already dealt with, viz., that this defendant as "butcher" does not come within the province of the "transient traders" section at all, and that the proper section under which his case should be dealt with is sec. 580 or 581 of ch. 223.

section 580 (5) provides for the regulation of the place manner of selling meat, and sec. 581 (1) for licensing regulating the sale of fresh meat by retail. These do, doubt, refer specifically to meat, but it is under a heading with a collocation of subjects, in the scheme of the Municipal Act, which betokens making general provision for the sale of commodities at fairs or in public markets.

The broad classification under which these sections fall is division XVII., "Fairs and markets," and the municipality enact laws to localize the sale of all sorts of meat, miscellaneous products and things, in markets and other fixed places. But the section under which this by-law is framed is under a different heading, viz., division XVIII., "Regulation of Trade," which also deals with a strange medley of subjects in the sub-headings, such as bread and bill-posters; ferries and ferries; auctioneers and tobacconists; runners and milk dealers; plumbers and hawkers; transient traders and victuallers' houses. Now, a man may be a hawker of apples, fruits, and vegetables (commodities dealt with specially under division XVII.: *Howard v. Lupton*, L. R. 10 Ch. 60); and a "transient trader" may be a person who carries on the trade of a butcher: *Gaskell v. Spry*, 1 B. & Ald. 400; and in Dr. Murray's Oxford Dictionary, sub voce, it is "one whose trade is the slaughtering of large tame animals for food; one who kills such animals and sells their flesh; in modern use it sometimes denotes a tradesman who chiefly deals in meat."

The rule should be discharged with costs.

TWRIGHT, MASTER.

JUNE 23RD, 1903.

CHAMBERS.

BURNHAM v. HAYS.

Motion to Dismiss as against one Defendant—Negotiations for Settlement with other Defendants,

Motion by defendant Hays to dismiss the action for want of prosecution.

V. A. Skeans, for applicant.

V. E. Middleton, for plaintiff.

THE MASTER.—Jeremiah Amey by his will dated 9th February, 1893, gave all his estate to his four daughters equally, subject to the life estate of his widow.

Mrs. Amey died 27th March, 1902. Probate of her will was granted on the 10th May following to defendant Hays, sole executor.

On 6th February, 1903, this action was commenced by one of the devisees of Jeremiah Amey against Mr. Hays, executor of her mother, for alleged waste committed by her mother on the father's real estate. The plaintiff takes nothing under her mother's will. Her sisters are perhaps properly joined with the executor as co-defendants. The substantial claim is against them. A defence by the executor would be in their interest. Since the issue of the writ and service on Mr. Hays, nothing further has been done. Mr. Hays entered an appearance on 17th February, so that, as far as he is concerned, the plaintiff is in default.

The affidavit of the plaintiff's solicitor states what is in doubt the fact, that the action has not been proceeded with at the request of one of the defendants, to enable her and her other two sisters to effect a settlement with the plaintiff. And he says very rightly that he was desirous of aiding them in this course.

Mr. Hays in his affidavit in reply submits that the other defendants are not necessary parties; that the action, as properly constituted, would be against him solely, and that it is being delayed in winding up the estate. I do not think we can determine this question at this stage. If the parties are fortunate enough to come to an amicable settlement, it will be unnecessary to decide it.

I think the practice recommended by Mr. Dalton in *Forbes v. Lee*, 12 P. R. 371, should always be observed. In the present case it is clear that the action could not be dismissed. To do so would be to violate the rule laid down also by Mr. Dalton in *Siewwright v. Leys*, 9 P. R. 200, which the Court of Appeal in *Langdon v. Robertson*, 12 P. R. 139, said was the proper rule to be acted upon in these cases.

I think that the motion must be dismissed; the plaintiff will be put on terms to go over to trial at the next sitting at Napanee. If this becomes difficult, leave can be asked to postpone. The costs will be in the cause.

MACMAHON, J.

JUNE 24TH, 1903.

TRIAL.

BIRMINGHAM v. LARKIN.

Master and Servant—Injury to Servant—Canal Works—Negligence—Dangerous Place—"Way"—Contributory Negligence.

Action for damages for injuries received by plaintiff while at work in the employment of defendants as a carpenter's assistant, assisting Clairmont, a fellow workman, in covering

top of a retaining wall of a canal which was being constructed by defendants. The plaintiff, in accordance with instructions from the superintendent of the works, went to the bottom of the canal bed where there were long planks, and selected and delivered three of them to Clairmont, who was on the top of the wall, and who placed them in position. The place where these three planks were required to be delivered was unobstructed and safe. Plaintiff then went and procured the fourth plank, and carried it a portion of the distance back, when, noticing Clairmont on the top of the wall, about 50 feet from the place where the plank was to be placed, he made a step or two in the direction of the wall where Clairmont was, and stepped on a board or plank, and a nail driven in went through the sole of his boot and into his foot, causing a severe injury.

J. H. Watson, K.C., and L. V. O'Connor, Lindsay, for plaintiff.

J. E. A. DuVernet, for defendants.

JACMAHON, J., held that the course plaintiff took and around which he traversed with the plank to reach the wall was, according to plaintiff's own evidence, not a "way" at all, as at that point the bottom of the canal was dangerous by reason of the large number of pieces of plank lying about with nails protruding from them. Having made use of a place that was dangerous in no sense a "way," when his employer had furnished a safe place at the point where the planks were required to be placed, the employer was not liable. *Howe v. Finch*, 17 D. at p. 190, *Pritchard v. Lang*, 5 Times L. R. 639, and *Smith v. Smith*, 7 H. & N. 737, referred to. Motion dismissed with costs.

D. C.

JUNE 24TH, 1903.

TRIAL.

WARREN v. MACKAY.

Charter—Voyage—Damages for Short Cargo—Demurrage—Delay and Detention—Counterclaim—Inferior Cargo.

This action was brought by the respective owners of three vessels, the Birkhead, the C. H. Burton, and the J. G. Blain, against R. O. & A. B. MacKay. The plaintiffs alleged that defendants chartered the three vessels to carry 2,400 tons of cargo from Cleveland to Hamilton; that defendants gave plaintiffs only 2,053 tons to carry; that plaintiffs had to proceed to Hamilton with 2,053 tons only; and they claimed \$433.75 damages for short cargoes and \$1,575 for demurrage.

The defendants counterclaimed for \$2,000 damages because of reason of inferior coal alleged to have been wrongfully loaded on the C. H. Burton by plaintiffs.

J. V. Teetzel, K.C., S. F. Washington, K.C., and A. M. Lewis, Hamilton, for plaintiffs.

J. W. Nesbitt, K.C., and J. G. Gauld, Hamilton, for defendants.

BOYD, C.—It appears to me very plain, upon all the evidence, that the contract for shipment of coal was made in the simple form contended for by defendants, and that it was not subject to any special conditions as contended by plaintiffs. The points urged by plaintiffs in evidence are that there were two representations made which influenced the making of the bargain by them: (1) that there was 14 feet of water at the Hamilton dock; and (2) that facilities would be afforded at that dock whereby 500 or 600 tons a day could be unloaded. . . . Defendants' letter of 13th October, confirming the oral contract, shews correctly what it really was, i.e., "charter of steamer 'Birkhead' and consorts 'Burton' and 'Blair' for about 2,400 tons of coal, Cleveland to Hamilton, \$1.25. Application to be made at Cleveland to the agent of the Pennsylvania R. R. Co. for 1,000 to 1,200 tons, and the Gill Kirby Coal Co. for 1,200." . . . The greater weight of evidence and circumstances is against there being any such term in the contract as that with regard to the 14 feet of water. . . . The claim made in the pleading was that defendants refused to load 2,400 tons of coal, and would not give plaintiffs more than 2,053. This is disproved. Plenty of coal was there, but with the necessity of loading 12 feet they could only carry 2,053. . . . There should be no recovery on account of the alleged shortage in the freight carried.

The claim for damages for delay and detention can not be based on any term in the contract as to the capacity of the dock to unload 500 or 600 tons per day, or that each of the boats was to be unloaded immediately on arrival at destination. There was no unreasonable delay in beginning to unload. . . . There was no room for all three to unload at the same time, they had to be taken seriatim, and the question of damage depends upon whether the work was duly prosecuted, having regard to the facilities as they existed at defendants' dock. . . . There appears to have been no unusual despatch and no obstruction interposed by or attributable to defendants which interfered with the efficient and timely prosecution of the work. That the stuff on part

the dock blocked the work is disproved. *Wright v. New Zealand*, 4 Ex. D. 165, is no longer law. See *Leigh Shipping Co. v. Cardiff*, [1900] 2 Q. B. 638. . . . The judges, upon the evidence, were discharged in a reasonable manner, having regard to the appliances ordinarily at use at Hamilton and under existing circumstances, and it is not to be expected to appear that any delay was caused or substantially contributed to by defendants. In the absence of any stipulation, this is now the limit of implied obligation upon the consignee as to the discharge of a vessel. Action dismissed with costs. Counterclaim for damages dismissed with costs, costs to be set off pro tanto.

BOYD, C.

JUNE 24TH, 1903.

TRIAL.

ATTORNEY-GENERAL v. CITY OF TORONTO.

Municipal Corporation—Public Park—Dedication by By-law—Subsequent Conduct—Revocation—Building Leases—Injunction—Parties—Attorney-General—Plaintiff—Interest—Costs.

Action and information for an injunction restraining defendant city corporation from making a lease to defendant Lemon of certain land on "the Island," a part of the city of Toronto, upon the ground that the land proposed to be leased is part of the Island Park as set apart by the corporation.

J. T. Small, for the plaintiffs.

J. S. Fullerton, K.C., and W. C. Chisholm, for defendant corporation.

F. Denton, K.C., for defendant Lemon.

BOYD, C.—I am not able to see my way clearly to order an injunction as sought by plaintiffs. A by-law was passed in November, 1880, No. 1028, purporting to establish a park on "the Island," and certain lots were designated therein, including those now in question, and it was enacted that these lots, together with such other lands as may hereafter be obtained from lessees or otherwise, shall be set aside, devoted to, and used as, a park." Other lands were afterwards by by-law in May, 1887, and November, 1887, directed to be taken and appropriated in order to enlarge the Island Park. Yet the action of the city authorities was contemporaneously and for years at variance with the conclusion that these lots now in question were regarded or treated as actually forming parts of an existing park. A special committee was appointed in

1901, called the Island Committee, who are elaborating a plan of park improvement, which will for the first time supply a definite policy to work upon from year to year. The city has treated the leases existing at the date of the first by-law in November, 1880, though then liable to forfeiture as existing and valid leases, under which rent has been paid on the whole lots down to 1883 or 1884, or perhaps later, and after that on parts of the lots on which buildings or improvements have been made, down to 1895, if not to the present time. Taxes have also been levied upon these lots during the terms of the leases, and have been paid to the city as an annual charge. Some 50 houses or structures, including a church building, have been erected upon the lots in question since 1880 till the present time. Plans have also been made, with the sanction of the city, and registered of certain of the lots, on which streets are laid out, with reference to which trees have been planted and houses built. The term used in intituling the by-law, to "establish" a park, does not denote the idea of permanency or unchangeableness. It indicates that much would be required in the particular locality to be done before the park could take fixed form and definite area. As said by the Court in *O'borne v. S. D. Co.*, 178 U. S. 38, it is manifest that to construe the word "establish" to mean, to fix unalterably, would throw the powers of the board into confusion and contradiction. See also *Dundee v. Morris*, 3 Macq. 166. The defendants acted in the belief that there was power to deal with the land designated as park land by leasing it, imposing and collecting rents and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners, though some regard for the enjoyment and benefit of the public has been always kept in view. The park scheme has not been abandoned, but the details and the area of its occupation on the island have been modified from time to time by successive councils. If the city has the power to exercise such control, it is not for the Court to interfere, nor can the wishes of the residents on the Island control the situation as against the legislative and dedicating powers of the corporation. In the absence of any distinct authority, the conclusion is, that the city has not exceeded its corporate or legislative powers in dealing as has been done with this Island Park. The doctrine of irrevocable dedication is not applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee simple. Having enacted a by-law to establish a park, the same body or its successors may repeal, alter, or amend it as it deems proper, so long as no vested right is dis-

urbed: R. S. O. ch. 1, sec. 8 (37); ch. 223, sec. 326. Attorney-General v. Toronto, 10 Gr. 439, and Re Peck and Town of Galt, 46 U. C. R. 219, referred to.

Plaintiff Mrs. Smith claims under a lease made in 1874, which was renewed in 1897, though made to date back as from 1895, for which the term is 21 years; the house originally built is occupied by her family now, and is about a quarter of a mile from the house being put up by defendant Lemon.

The evidence does not satisfy me that she has any such interest as to give her the right to appear as a private plaintiff. No special grievance, personal or proprietary, attaches to her as owner . . . which is injured by the erection of the Lemon house. Besides, the original lease under which she took was made in 1874, prior to the park scheme, and the renewal in 1895 or 1897 was after registration of the plans made in 1883 and 1890, shewing that the city had sanctioned the subdivision of lots 56, 57, and 59, into lesser lots for the purpose of being leased, and so incompatible with that locality possessing or being likely to possess the character of a park.

The joint information and action fails and should stand dismissed, but, as the motives of the relators and plaintiff are most commendable, I do not give costs if this ends the litigation. Should an appeal be lodged, however, then I think costs should be paid to the city as a proof of good faith in prolonging the controversy.

HARTWRIGHT, MASTER.

JUNE 26TH, 1903.

CHAMBERS.

WILKINSON PLOUGH CO. v. PERRIN.

*Attachment of Debts—Equitable Assignment of Fund Attached—
Disputed Facts—Order Directing Trial of Issue.*

On the 11th February, 1903, an order issued in this case, on motion of the plaintiffs, as judgment creditors of defendant, attaching certain moneys in the hands of one Hourigan.

Hourigan, through mistake, allowed this order to be made absolute, on 19th February, 1903, but on payment of costs he was allowed by Mr. Winchester to have the order rescinded; and the motion was renewed, on notice to Hunter and others, who claimed the moneys in question, by virtue of an alleged equitable assignment to them by Perrin, during an arbitration in respect of certain claims and cross-claims made between them respectively.

The proof of the alleged assignment depended largely upon the force of a memorandum made by the arbitrator and upon the precise facts and dealings of the parties at the time and subsequent thereto. The arbitrator made an affidavit setting out exactly the terms of his memorandum, and was cross-examined thereon by the plaintiffs and the defendant.

After several adjournments the motion was finally argued on the 25th June, 1903.

R. B. Henderson, for plaintiffs.

W. M. Boulton, for Hunter et al.

C. A. Moss, for Hourigan, the garnishee.

THE MASTER.—Mr. Henderson made a full and elaborate argument to prove that there was no equitable assignment in fact. He contended that, even assuming the truth of what was alleged by the claimants, Hourigan had never been informed by Perrin of the assignment. He cited and commented on many cases, which need not be noticed here in detail. Those cases and arguments were met by Mr. Boulton with other cases. But the point on which he relied was that an issue should be directed, in which his clients were quite willing to be made plaintiffs, and thereby assume the burden of proving their alleged assignment.

Mr. Henderson conceded that such was the proper course to adopt, unless on the undisputed facts I could find in his favour.

This I think I cannot do. The garnishee Hourigan was a co-defendant with Perrin in one of the actions which was referred to the arbitrator. The agreement of Perrin is positively asserted by the arbitrator, who has no interest in the matter one way or the other. He is corroborated by Mr. Sparham and three other persons who were present on the occasion of the memorandum made by the arbitrator. Hourigan himself states that he was made aware of the agreement so made. Even if not in fact communicated by Perrin to Hourigan, it may be successfully contended that the agreement as to the balance in Hourigan's hands, if proved, would of itself be sufficient, as being a representation made to the claimants whereby they were induced to alter their position so as to allow the arbitration to proceed. On that point I do not desire to be understood as expressing any opinion. I only put it forward as shewing, amongst other things in the evidence, that there is a substantial question at issue between the plaintiffs and the claimants, and that they are widely

part as to the facts. I cannot see anything culpable in the conduct of the garnishee to deprive him of his costs.

An order will issue, in the usual form, directing payment into Court, less the taxed costs of the garnishee, of the amount in his hands. There will be an issue directed between Hunter et al. as plaintiffs and the Wilkinson Plough Co. as defendants. The question will be whether the plaintiffs in that issue are entitled to the moneys by reason of their alleged assignment or not.

The costs of this motion, as between the parties to the issue, will abide the result.

STREET, J.

JUNE 26TH, 1903.

CHAMBERS.

CONMEE v. LAKE SUPERIOR PRINTING CO.

Libel—Pleading—Defence—Fair Comment—Untrue Statements of Fact—Embarrassing Pleading—Amendment.

Appeal by plaintiff from order of Master in Chambers (ante 509) dismissing application by plaintiff to strike out paragraphs 4 and 5 of the amended statement of defence of defendant Russell and the 3rd paragraph of the statement of defence of defendant company, or in the alternative for a better statement of the nature of the defences, or for particulars. The plaintiff had been a member of the Provincial Legislature, and was again a candidate for re-election at the time of the publication of the alleged libel.

N. W. Rowell, K.C., for plaintiff.

C. A. Moss, for defendants.

STREET, J.—Even a public man engaged in a Parliamentary election has certain rights, and one of them is that he may bring an action for libel in case statements are published asserting that he has been guilty of improper acts, unless those statements are true. All acts of his, bearing upon his public position in any way, or as to his fitness or unfitness for it, are public property, and may be commented upon within the limits of what is known as fair comment; but there is a distinction between commenting upon acts which he has actually committed, and commenting upon acts which he is alleged, untruly, to have committed. To invent statements of facts, or to adopt as true the untrue statements of facts made by others, and then to comment upon them as being true is not fair comment, and is not protected. The result is that where an alleged libel upon a

MACMAHON, J.

JUNE 27TH, 190

WEEKLY COURT.

LUCAS v. TEGART.

*Bankruptcy and Insolvency—Assignment for Creditors—Action
Creditors against Assignee—Distribution of Moneys—Costs
Lien.*

Motion by plaintiffs for judgment on further direction and costs after report of Master in an action brought by the creditors of one Schaffer against defendant, as assignee of the estate of Schaffer for benefit of creditors, under R. S. O. ch. 124, alleging that they had been paid no dividend, charging defendant with having converted the assets of the estate to his own use, and asking for an account and administration of the estate.

The master reported that 26 creditors of the estate had not been paid a dividend, and that defendant had \$472.64 in his hands for distribution among the creditors.

C. A. Moss, for plaintiffs.

L. F. Heyd, K.C., for defendant.

MACMAHON, J.—Plaintiffs are entitled to judgment against defendant for the amount in his hands. And I follow *Randall v. Burrows*, 11 Gr. 364, and allow plaintiffs their costs of the action and reference and of this motion.

The amount of the judgment is to be paid into Court, and if plaintiffs are unable to recover the costs from defendant, plaintiffs' solicitors are to have a first lien on the fund in Court for their costs.

JUNE 27TH, 190

DIVISIONAL COURT.

COLBOURNE v. HAMILTON STEEL AND IRON CO.

*Master and Servant—Injury to Servant—Rolling Mills—Dangerous
Place—Absence of Guard—Factories Act—Defect in Ways and
Premises—Workmen's Compensation Act—Evidence for Jury.*

Plaintiff was employed by defendants in their rolling mills at Hamilton, and this action was brought by him to recover damages for injuries sustained by him. He had been working at a machine for punching holes in steel plates when something went wrong with the punch; plaintiff stepped back four or five feet while it was being set right; and almost immediately he was struck by the end of a long bar of red hot steel which was being run down to where he stopped. The

bar was of unusual length. Bars of the ordinary length were being constantly run down in the same direction, but none had been known before to reach the point where plaintiff was struck. He was not ordered to move to where he hid, but he said that he stepped there to get out of the way, because there was no room to go any other way, on account of a number of iron bars which were lying on the floor.

A nonsuit was ordered by BOYD, C., at the trial.

Plaintiff moved to set aside the nonsuit and for a new trial.

The motion was heard by FALCONBRIDGE, C.J., STREET, J., and BRITTON, J.

J. W. Nesbitt, K.C., for plaintiff.

E. E. A. DuVernet and B. H. Ardagh, for defendants.

STREET, J.—. . . There was evidence here which should have been submitted to the jury.

The red hot steel bars, after being put through the rollers, were run out from them upon the straightening bed. There was evidence that plaintiff, stepping away from the punching machine . . . was obliged to step back towards the straightening bed, because all other places were blocked by iron bars lying on the floor. The straightening bed, he says, was only some four to six feet away from where he was working, and was unguarded, and he stepped back upon it just at the moment that a hot bar of iron was run down it so far that it struck him, and he was injured.

It appears to me that there was evidence here to go to the jury that the straightening bed was a dangerous place which should have been guarded, under the Factories Act, and also that there was evidence of a defect in the condition of the ways, works, plant, buildings, or premises of defendants, under the Workmen's Compensation Act, which should have been submitted to the jury. The arrangement of the premises by which bars of hot iron were run down the straightening bed, unguarded, and in close proximity to men working at other machines, would be evidence of a defect in the ways and premises of defendants, in my opinion.

New trial ordered. Costs of former trial and of this motion to be paid by defendants.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

JUNE 27TH, 1901

DIVISIONAL COURT.

LINTS v. LINTS.

Life Insurance — Benefit Certificate—Beneficiary—Designation—Substitution—"Dependent"—Statute—By-laws of Society.

Appeal by defendant from judgment of FERGUSON, J., in favour of plaintiff, Serena Lints, in action brought by her against Fanny Lints to determine the ownership of money paid into Court by the Independent Order of Foresters, being the amount due under a benefit certificate issued by them on 27th February, 1899, being in fact a policy of insurance upon the life of John Henry Lints for \$2,000. In the application for the insurance Lints designated his mother as his beneficiary, adding, however, the following qualification, "reserving to myself the power of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the Order." By the terms of the certificate the benefit was payable at the death of Lints "to the widow or other beneficiary or trustee duly designated" by the insured. When this certificate was issued, the insured was married to plaintiff, but was not living with her. On 23rd August, 1899, he went through a form of marriage with defendant (Fanny Hawn), who was not aware that he was a married man, and he lived with her until his death in March, 1900. On 26th November, 1900, he applied to the society to change the beneficiary from his mother to his "wife, Fanny Lints," and the change was made by the proper officers. After his death the mother assigned to plaintiff all her rights under the certificate.

R. U. McPherson, for defendant.

J. J. Warren, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BROWN, J.) held that the attempt of the assured to divert the benefit from his mother to defendant, who was not his wife but merely a "dependent," not within the privileged class, being contrary to the statute, availed nothing, and the mother was at the time of the death the only beneficiary. The reservation on the face of the instrument by which the original designation was made, of the right to revoke the designation and divert the benefit to another, is no stronger as a matter of legal construction than where the original designation declared on its face to be subject to by-laws which give the same rights. The statute has been declared to override the by-laws in the latter case, and it must therefore override the reservation in the former. *Mingaud v. Packer*, 21 O. 267, 19 A. R. 290, and *Re Harrison*, 31 O. R. 314, followed.

Appeal dismissed with costs.

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RITTON, J.

JUNE 17TH, 1903.

TRIAL.

SLONEMSKY v. FAULKNER.

*Landlord and Tenant—Attornment—Damage to Tenant by Act of
Third Party—Negligence.*

Action tried without a jury at Ottawa. Mary A. Casey died intestate, leaving real estate which was heavily incumbered. Letters of administration were obtained by the Ottawa Trust and Deposit Co., who, pending a sale of the premises, leased them to one Donovan. The latter sublet the premises on the ground floor to different persons, one of whom was the present plaintiff, but Mrs. Casey's husband and children continued to reside upstairs, without paying rent or acknowledging any tenancy. The property was sold to the defendant on 30th October, 1902, and he at once notified all the tenants that he was to collect the rent in future. The plaintiff attorned and paid the November rent to the defendant, but the Casey family did nothing to recognize defendant as landlord. Defendant refused to accept the title from the trust company, because of a possible claim by the husband as tenant by the curtesy. The trust company then obtained an assignment of a judgment that had been recovered by the mortgagee of the property some time before, but it was not until January, 1903, that a vesting order was issued to the defendant.

On 13th December, 1902, Mr. Casey died, and on the following day the children moved out, but they did not remove their furniture or give up the key until 10th January, 1903. They did not notify defendant, but he learned that they had gone out, and he obtained access to the premises immediately afterwards to repair a waste-pipe which had frozen in a vacant room downstairs. On the night of 29th December, 1902, the waste-pipe upstairs leading from the street main, burst,

flooding the plaintiff's store, and damaging the stock, consisted of clothing. Plaintiff sued for damages. Defendant denied liability, contending that either the trust company or the Caseys were liable, as he had not possession of the premises upstairs, or a title by which he could have obtained possession at the time the damage occurred.

M. J. Gorman, K.C., for plaintiff.

D. J. McDougal, Ottawa, for defendant.

BRITTON, J.—I think I must hold the defendant liable in this case. It may be, and I think it is, a very hard case for him in some respects; and it would perhaps be difficult to find another case which—in the peculiar facts and circumstances which render him liable, if he is liable—is

I think he must be held, for the purposes of this case, to have been the person in possession of and in control of the property, although he had not a perfected title at the time the accident occurred. The sale took place on the 30th of October, 1902, and he then acted in all respects as the owner of the property, subject, of course, to any rights he might have over the trust company, who were the vendors of the premises. He assumed to deal with the tenants as if he owned the property, and from the 1st November he began to deal with the plaintiff in reference to these premises.

So it went on until some time in December. The defendant then went to the Caseys. He did not interview Mr. Casey because he was sick; and, as a matter of fact, Mr. Casey died on either the next day, or, at all events, very shortly after. This intended interview by the agent of the defendant, Faulkner, knew of the death; and he says that the agent told him that the Casey family had moved out, and that they had gone to somewhere on Besserer street to the defendant's relative. So that at that time there was knowledge on the part of Faulkner of the Caseys having left the house, and their place of residence; and it was at a time of the year when, in the ordinary course of things, frost might be expected. The injury to premises left vacant—left vacant, that is, in the sense of not being occupied as a residence, though there might have been furniture in the house. But there is more than that in the case. It is admitted that there was knowledge on the part of Faulkner of the waste-pipe in the vacant premises being frozen, and of a plumber having been sent for to having cut that pipe off.

There was a discussion with reference to the lock. On the day that there was information given to Faulkner that the Caseys had moved out, although their furniture re-

n the place. This was at a time when the defendant was receiving rent from the plaintiff as a tenant, when he had received one month's rent, and when a duty was cast upon him with reference to the tenants who were occupying in good faith, to look after the property. With that knowledge, and dealing, as he was, with the other tenant, he takes no steps to find out how the upper part of the premises is occupied, in fact does nothing, according to his own evidence, until this accident occurred. So I think there was negligence here on the part of the owner of a property who had knowledge that the family of a person who had been occupying it, had gone away, and that it was negligence with respect to the plaintiff of which the latter has a right to complain.

By what was done between the parties the relation of landlord and tenant had been established between the plaintiff and the defendant. No such relation was established as between the defendant and the Caseys. It simply stands that the defendant, exercising authority, taking possession of this property, dealing with it as the owner, left the upper part of it unprotected after he had knowledge of the head of the house having died and the acting head of the house—that is Miss Casey—having left with the children.

Under the circumstances I think there is evidence of negligence; and hard as it may be on the defendant, I think it is a case where, if, as Mr. Gorman puts it, one of two innocent parties must suffer through the fault of another, that one must suffer who left it in the power of another to do the act, or to neglect to do something that he ought to have done; and, while I feel that I am dealing with a case that is not perhaps expressly covered by authority, I think that is the only disposition I can make of it.

Judgment for plaintiff.

CARTWRIGHT, MASTER.

JUNE 29TH, 1903.

CHAMBERS.

LANDER v. BLIGHT.

*Summary Judgment — Promissory Note — Defence—Contemporaneous
Parol Agreement.*

Motion by plaintiff for summary judgment under Rule 603.

M. H. Ludwig, for plaintiff.

H. A. E. Kent, for defendant.

THE MASTER.—Plaintiff's affidavit sets out the indorsement on the writ of summons, which is in the usual form

where the action is on a promissory note. The security dated 1st June, 1899, for \$1,000, payable in 3 years, interest at 6 per cent. The payment of interest on 1st last is admitted.

Defendant's affidavit states "that the note sued on was given to plaintiff on the understanding that the same was merely an acknowledgment, upon which I had to pay the interest month so long as she lived; the principal after her death to go to me or my representatives as my share of her estate."

Defendant was not cross-examined, but plaintiff filed an affidavit in reply denying the statement of defendant. Defendant was not cross-examined.

Mr. Ludwig argued that the alleged defence could not be heard, as it was an attempt to vary the terms of a written instrument by a contemporaneous parol agreement, *New London v. Neale*, [1898] 2 Q. B. 487.

Mr. Kent relied on *Jacobs v. Booth's Distillery Co.* L. T. R. 262. . . . I am not able to see how the present case differs. I think the circumstances are more favorable to defendant than they were there, and I feel compelled to dismiss the motion. . . . Costs to defendant in this cause.

JUNE 29TH,

DIVISIONAL COURT.

STEWART v. GUIBORD.

Equitable Execution—Declaration of Right to Apply Amount of Judgment—Plaintiff by One Defendant against Co-defendant—Foreign Judgment—Simple Contract Debt—Declaratory Judgment—Inequitable Proceeding—Statute of Limitations—Absence of Defendant in Province.

Plaintiff had a claim against the Government of Ontario for \$1,500, and he was indebted to defendant Lallemand for a considerable sum. Lallemand was in financial difficulties and assigned to defendant Guibord his claim against plaintiff. Guibord brought an action in the Province of Ontario against plaintiff upon this claim, whereupon the Montreal Rolling Mills Co., having a judgment in the Province of Quebec against Lallemand, intervened and sought to have the debt against plaintiff, alleging that it was in fact the property of their debtor, and was held by Guibord only as trustee. The company, however, finding themselves unable to prove their case, withdrew their intervention; then plaintiff settled the action by assigning to Guibord his claim against the Government, and Guibord released him from the

Afterwards plaintiff purchased from the company their judgment against Lallemand, and brought this action in Ontario against Guibord and Lallemand, claiming judgment against Lallemand upon the Quebec judgment assigned to him, and against both defendants a declaration that Guibord held the transfer of the claim against the Government merely as trustee for Lallemand, and that Lallemand was the beneficial owner of it, the object being to enable plaintiff to obtain the money from the Government in some other proceeding, or to have the amount due from the Government applied by some other proceedings in settlement pro tanto of his claim as assignee of the company's judgment.

The action was referred for trial to the local Master at Ottawa, who found in favour of plaintiff. Defendants appealed to MEREDITH, C.J., who reversed the decision of the Master so far as plaintiff's claim against Guibord was concerned, dismissing the action with costs as against him, and ordering judgment to be entered against Lallemand for the amount of plaintiff's claim on the Quebec judgment: ante 568.

From this judgment plaintiff appealed to a Divisional Court, and defendant Lallemand also appealed upon the ground that the remedy against him in this Province was barred by the Statute of Limitations.

Glyn Osler, Ottawa, for plaintiff.

W. E. Middleton, for defendants.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.— . . . Stewart has a simple contract debt against Lallemand; Guibord holds a claim against the Government; Stewart brings this action against Lallemand and Guibord, asking for judgment against Lallemand upon his simple contract debt, and for a declaration against both defendants that Lallemand, and not Guibord, is beneficial owner of the claim against the Government.

In my opinion, he is not entitled to such a declaration because at the time he began this action he was not a judgment creditor of Lallemand: *Thompson v. Cushing*, 30 O. R. 23, 388. . . . The reasons which prevent the owner of mere simple contract debt, not reduced to judgment, from making garnishing proceedings or proceedings for equitable execution, prevent his having any locus standi to obtain the preliminary relief of a declaration that the debt which he desires to seize is due to his debtor.

Further, . . . this is not a case in which the to make a declaratory judgment merely could be exercised. No consequential relief is asked, nor is suggested that any is within our power . . . We not follow up the proposed declaration by any further or judgment for the payment by the Government to tiff of the money which he is seeking to obtain. This the case, the authorities seem clearly against the plaintiff to obtain a mere declaration: *Barraclough v. [1897] A. C. 615; Grand Junction Waterworks Hampton Urban Council, [1898] 2 Ch. 331.*

The appeal of plaintiff should, therefore, be dismissed with costs. . . .

The judgment in the Province of Quebec was rendered on 10th October, 1893, and the present action was begun on 29th May, 1902. By the law of Quebec the judgment may be enforced at any time within 20 years. In this Province, being merely a simple contract debt, the remedy would, under ordinary circumstances, be barred at the end of 6 years from the time it became due, that is to say, from the date of the recovery of the Quebec judgment. It appears, however, that at the time of the recovery of the judgment Lallemand was domiciled and resident in Quebec, and that he has not been in this Province at any time since then.

Under these circumstances, I think, the remedy is barred by sec. 40 of R. S. O. ch. 324, and the debt was not barred in *Boulton v. Langmuir*, 24 A. R. 618; *Bugbee v. Clerger*, 3 A. R. 96.

Appeal of defendant Lallemand dismissed with costs.

JUNE 29TH,

C. A.

BIRKBECK LOAN CO. v. JOHNSTON.

Building Society—Shares—Advance on—Trusts—Notice—Mortgage—Pledge of Shares—Action—Parties—Variation of Judgment

Appeal by plaintiffs from the judgment of a Divisional Court, 3 O. L. R. 497, 1 O. W. R. 163, in so far as it was against plaintiffs, in an action against Amelia Johnston, Frank K. Johnston, and Anna K. Johnston, to obtain a consolidation of two mortgages, to recover the amount due on the mortgages, and for foreclosure of the interest of defendants in certain shares of the plaintiffs' stock, in default of payment. The Court below held that plaintiffs were not bound to give notice that the mortgagor was not the owner of the shares, and had no power to mortgage; that sec.

R. S. O. ch. 205 did not empower plaintiffs to disregard the trusts; and that plaintiffs could not consolidate the two mortgages as against the person to whom the mortgagor had conveyed the lands, subject to one of the mortgages, as that person was a purchaser for value without notice.

The appeal was heard by MOSS, C.J.O., OSLER, MACENNAN, GARROW, and MACLAREN, JJ.A.

A. B. Aylesworth, K.C., and T. H. Luscombe, London, for appellants.

P. H. Bartlett, London, and J. F. Faulds, London, for defendants.

Moss, C.J.O.—Considering the comparatively trifling amount at stake in this case, it is to be regretted that, owing to the frame of the action and the absence of necessary parties, it is not possible to finally determine some of the questions which the plaintiffs call upon us to deal with on this appeal.

The shape the case took at the trial was not at all that which was presented by the pleadings.

The plaintiffs by their pleadings made no claim to the six C. shares as forming part of the securities assigned to them by the transfer of the 20th July, 1897. The defendants Frank K. Johnston and Anna K. Johnston denied all knowledge of the transaction of 20th July. Nowhere was any reference made to the claims or rights of the other children of the defendant Amelia Johnston as cestuis que trust of the six C. shares. These children are not parties, nor are their claims or rights properly represented. The defendant Amelia Johnston has made no defence, and the interests of the other defendants are in point of form adverse to those of their brothers and sisters. Therefore, there can be no disposition of the case as regards the six C. shares in question as against the interests of these children. It may be assumed, as I think the evidence shews, that the shares were intended to be dealt with by, and were included in, the transfer of the 20th July, 1897, but that does not advance the plaintiffs' case as regards these shares. If, as contended by the defendants at the trial and on the argument of the appeal, the defendant Amelia Johnston held these shares in trust for the children, the plaintiffs' dealing with her in respect of them is not protected by R. S. O. ch. 205, sec. 53. That section does not entitle a company to obtain for itself a better title to its shares than its grantor or mortgagor has.

The object of the section was to protect a company responsibility where a holder of shares in trust transferred to some other person, and the company were called upon to assent to the transfer or to permit it to be made.

The plaintiffs therefore cannot hold these shares by a higher title than the defendant Amelia Johnston had, as a trustee she could not deal with them to the prejudice of the cestuis que trust. The evidence seems to shew that the money obtained from the plaintiffs was for the purpose of being expended for the benefit of the children, and on a properly framed record, and with the necessary and proper proceedings before the Court, a case might perhaps have been made establishing a special lien on the trust interest to satisfy the balance of the plaintiffs' claim under the transfer of the 20th July, 1897.

As the case now stands, this could only be done in a new action by a complete recasting of the whole case, and on payment of the costs already incurred.

Nothing would be saved to the plaintiffs by any amendment of this kind. There are, however, one or two matters in the judgment of the Divisional Court as issued which should not remain as they are. The defendants concede that the defendant Frank Johnston should not have been awarded any costs, and the judgment should be amended accordingly. It is also incorrect in referring to any lands as included in the transfer of the 20th July, 1897, and it should not be in any way with the six C. shares, for, as pointed out, there can be no adjudication in respect of them. With these amendments, the appeal should be dismissed with costs, but the judgment should be without prejudice to any right which the plaintiffs may claim to have against the six C. shares, and moneys properly advanced for the benefit of the parties who are officially entitled thereto.

The other members of the Court agreed in the result. OSLER and MACLENNAN, JJ.A., giving reasons in writing.

JUNE 29TH,

C.A.

BANQUE PROVINCIALE DU CANADA v. CHARLES NEAU.

Negligence—Agent of Bank—Promissory Note—Neglect to Transfer—Proper Form—Subsequent Alteration—Loss of Remedy on Appeal—Damages.

Appeal by plaintiffs from judgment of MEREDITH, J., at the trial at Ottawa, awarding plaintiffs three cents nominal damages and costs on the appropriate scale and a

of costs to defendant on the High Court scale; in an action for damages for alleged gross negligence and disregard or omission to follow plaintiffs' instructions to defendant, while local manager of their bank at Ottawa, in not obtaining a joint and several note for \$5,000 from certain persons for an advance of that sum, and for materially altering and avoiding a joint note made by them for such advance by writing the words "jointly and severally" on the face of the note before the words "promise to pay," whereby plaintiffs lost all right of action thereon and the money so advanced. The appellants appealed on the ground that they were entitled to substantial damages and costs.

The appeal was heard by MOSS, C.J.O., OSLER, MACENNAN, GARROW, and MACLAREN, JJ.A.

A. B. Aylesworth, K.C., and W. H. Barry, Ottawa, for appellants.

W. D. Hogg, K.C., for defendant.

Moss, C.J.O.—The action of the defendant in accepting promissory note which was not joint and several and did not bind the parties jointly and severally, was undoubtedly a breach of the instructions which he received from his superiors. And if the plaintiffs' loss had been occasioned by that act, the defendant would have to make good the amount. But the form of the note which he did take was sufficient to secure to the bank the liability of the parties in this Province as effectively to all intents and purposes as if the note had been in the exact form called for by his instructions. And therefore no more than nominal damages to the plaintiffs resulted from that act or omission.

The next inquiry is, should the defendant be held liable for the consequences of his subsequent act? Because of his instructions, and probably also because he was more cognizant of the laws of Quebec than of Ontario, the defendant naturally attached importance to the note being expressed to be joint and several. And, upon discovering that it was not in that precise form, it was to be expected that his mind would be directed to endeavouring to repair what he thought was a material objection.

It cannot be said that he had any intention of injuring or impairing the plaintiffs' position, or that he was guilty of misconduct in that sense. His object was to do something which would improve the plaintiffs' position, if possible. The case is not one of intentional injury to his employers, but of an act done in good faith and with a purpose meritorious in itself.

The question is, did the defendant exercise such a reasonable degree of skill, care, and diligence as was required of him under the circumstances, or did he shew such a want of capacity or want of attention to the plaintiffs' interests as to render him responsible for the loss which occurred? And that is a question to be determined upon the circumstances of the case, taking into consideration the plaintiffs' knowledge of the defendant's capacity and fitness for the position, the subsequent knowledge of what had been done, and their attitude with regard to it before the loss had actually occurred.

The defendant was of course bound to exercise reasonable care and diligence in looking after and protecting the plaintiffs' property in his possession or under his control, including, of course, the promissory note which he had received from the plaintiffs upon the transaction in question. But the plaintiffs cannot expect their managers or cashiers to be infallible, or that they may never fall into an error of judgment, save at the peril of having to make good any loss occasioned by the mistake. Nothing higher could be required of the defendant in his position than reasonable skill and ordinary diligence, by which is understood such skill as is ordinarily exercised by persons of average capacity engaged in similar pursuits. A loss caused by an act or step which a banker of experience acting in similar circumstances might be liable to do or take, is not a loss for which the bank looks for indemnity from the person whose error caused the difficulty.

In the present case the evidence shews that the defendant wrote the words "jointly and severally" into the note, with the idea of making it conform to the intention of the parties, and under the belief that all the parties to it would assent to the change, and ratify it by their initials. Two of the parties to the note by their words and conduct led him to that conclusion, and it was not until after the words had been written that doubts were raised and he was led to think that he had acted prematurely. Upon that he hesitated as to whether he should present the altered note to the other makers, and was led to conclude not to do so. His next proceeding was what any prudent person should adopt. He consulted the bank solicitor, and was advised by him that under the circumstances the validity of the note was not affected. This advice would of course tend to strengthen his conclusion not to endeavour to get the initials of the other makers to the alteration. The defendant afterwards informed the general manager of what had taken place. He did not take the precaution that the note was rendered invalid, and the only suggestion or direction he gave to the defendant was to see

the next note was in proper form. The opinions of the general manager and of the solicitor appeared to coincide that no harm had been done by the writing on the note, and seemed to render it unnecessary for the defendant to take immediate action.

The evidence as a whole seems to me to relieve the defendant from the charge of gross negligence which it was incumbent upon the plaintiffs to establish. He cannot be said to have been guilty of negligence in the sense that he acted in a manner in which no person in his position exercising ordinary care and judgment would have acted. Under the circumstances he had reasonable grounds for supposing that what he was doing would be implemented by the parties to the note, and his action after the difficulty arose was under the advice and with the cognizance of the plaintiffs' officials. That in the result his judgment proved to be wrong and his act prejudicial to the plaintiffs, is not enough, in my opinion, to render him liable: *Stafford v. Bell*, 31 C. P. 77; S. C., 6 A. R. 273.

I think the appeal should be dismissed.

MACLENNAN and MACLAREN, JJ.A., gave reasons in writing for the same conclusion.

GARROW, J.A., also concurred.

OSLER, J.A., dissented, and gave reasons in writing for being of opinion that the appeal should be allowed.

JUNE 29TH, 1903.

C. A.

DODGE v. SMITH.

Limitation of Actions — Mineral Lands — Reservation in Deed — Estoppel—Tenancy—Payment of Taxes—Leave to Adduce Further Evidence on Appeal.

Appeal by plaintiffs from judgment of a Divisional Court, O. L. R. 305, 1 O. W. R. 46, reversing the judgment of COUNTESS, J., at the trial, and dismissing the action, which was brought to restrain trespass to land by working mines thereon, and to recover damages therefor.

The land consisted of lot 17 in the 6th concession of the township of Bedford, in the county of Frontenac. The defendants claimed title under one Patrick Murphy to both the land and the mines, alleging title by possession. It appeared that the defendants' predecessor, after he had acquired title, nevertheless took a conveyance from the owner of the paper

title, reserving to the grantor the mines and minerals, and gave a mortgage back "saving and excepting the mines and minerals which the said mortgagor has no claim to." The Divisional Court held that this did not re-vest the mines in the grantor, nor were the defendants estopped, the action not being based on the mortgage.

A. B. Aylesworth, K.C., for appellants.

G. H. Watson, K.C., for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MALENNAN, GARROW, and MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.— . . . While the case was standing for argument in this Court the plaintiffs discovered in an unused building or part of the residence of E. G. Dodge through whom they claim title to the premises in question some letters appearing to bear upon the questions in dispute. Thereupon, and upon affidavits now of record in this Court, they moved for and obtained leave from this Court to adduce evidence of the letters, together with explanatory evidence, liberty being also to adduce evidence in answer.

Pursuant to the order, evidence was adduced by both parties before the Judge of the County Court of Frontenac, and the same was returned to this Court. Thereafter the appeal was argued upon the whole case.

The defendants' contention is, and the Divisional Court so found, that their ancestor Patrick Murphy had acquired a title to the premises by virtue of the Statute of Limitations as against the plaintiffs' predecessors in title, prior to the execution of the conveyance of 10th July, 1884; and that the execution of the conveyance had not the effect of re-vesting in the plaintiffs' predecessors the title to the minerals.

The evidence at the trial did not disclose the origin of Patrick Murphy's possession of the lands more than to show that they had been in occupation by his brother John Murphy, and that upon the latter giving up possession Patrick entered upon the lands and remained there.

The evidence subsequently adduced shews that Patrick Murphy went in as tenant of Edwin Dodge, the then owner of the lands, probably in 1870, and that he continued as tenant, paying rent, for some years thereafter. It was proved that between 1869 and 1874, one C. H. Russell was an agent for Dodge in connection with these lands. During a portion of these years Dodge was carrying on mining and prospecting over parts of the premises, and Russell was in the habit of coming from the United States to visit the properties and pay the men engaged in mining.

The renting and looking after the payment of taxes and the general care of the properties for Dodge appear to have been placed in the hands of one Foley, a shopkeeper in the neighbourhood, who is now dead. Several letters in his own hand writing written to Russell between January, 1869, and March, 1874, were proved. In all but one of these he speaks of having received money on account of the land, and as declarations against interest they are receivable in evidence. In a letter dated 9th February, 1870, he says that John Murphy leaves in March and will pay up rent in full. His brother Patrick agrees to pay the same rent as John paid for his place, and also \$20 per annum, taxes included, for another farm. In another dated 4th November, 1871, he says that John Murphy's lot is yet occupied by his brother Pat. Pat Murphy and Bill Judge have paid rent so far. In another on the 26th February, 1872, he says: "P. Murphy has paid rent to me \$75, and W. Judge has also paid the \$15 rent, and both intend to continue." In the last one, dated 28th March, 1874, he speaks of having asked Murphy for the rent, and he promised to hand it in in a few days.

Then there are some letters purporting to be written by Patrick Murphy to E. G. Dodge, who became the owner of the premises in April, 1877. Letters appear to have been written between March, 1878, and February, 1881, and there are two others which bear no date, but were probably written at a still later date. Patrick Murphy was unable to read or write, and it is contended that there is no evidence that they were written or sent by his direction or with his authority. Thomas Asselstine, a witness called for the plaintiff, had been a collector of taxes for the township of Bedford at times between the years 1877 and 1890. He knew Patrick Murphy and his brother John, and the various properties. He knew that Patrick was in occupation of the lands formerly occupied by John and paid taxes upon it. He was shewn a letter dated the 2nd December, 1880, purporting to be written to Mr. Dodge, and signed "Patrick Murphy," and identified it as his handwriting, but said he could not remember writing it, or being asked by Patrick Murphy to write. He added: "It is likely he may have asked me when I was collecting." Asked, "Why do you say that?" he answered, "For the reason that he was always talking to me about his affairs when I was collecting taxes, and said that he must pay the taxes and have the receipts to send to Dodge. I remember him telling me that several times." Further on he was again asked, "If you wrote that, how did you come to write it?" He answered, "He certainly wished me to write it." In answer to a question by the learned

County Court Judge, he said, "I could not say that he asked me, he must have told me to write for him anyway, or I would not have done it."

If the matter had remained in this way, there could have been no question but that the letter was proved to have been written by Asselstine at Murphy's request. On cross-examination he at first reiterated positively that it was his writing, but, being referred to another paper written by him and some suggested variations of writing and spelling being pointed out, referring to exhibit "J," he said, "Well that don't look like my writing on closer examination; well, say I don't think that is my writing. I don't think that is my writing when I come to look at it." And finally he said, "I will say that the name on the back of it, Patrick Murphy, never wrote"—thus bringing his positive denial down to the signature. He had been shewn a paper signed by him, purporting to be a certificate of payment of taxes by Patrick Murphy and others for the years 1879 and 1880, and identified it as being in his handwriting. He said he gave it to Patrick Murphy. Asked "Why did you give that particular certificate in that way, in the way it is given?" he answered "He told me he wanted to send it to Mr. Dodge to let him know the taxes were paid on the property. Of course he and I ways talked with me in that way."

This certificate was one of the papers produced by the plaintiffs on the application for leave to adduce further evidence, together with a letter dated the 10th March, 1880, purporting to be signed by Patrick Murphy, and addressed to Mr. E. C. Dodge, in which it is said, "As we were disappointed in meeting each other, but however I will give you what I offered for this year, if you leave it to me let me know for I have got a line fence to build from one concession to the other; if you are going to let me have it, I will keep the rate paid on your lands here, as I have done. I hope you are well. Here is the bill of taxes that you demanded from me Patrick Murphy."

Obviously the bill of taxes is the certificate which he had obtained from Asselstine. It is not shewn by whom the letter was written, but it is produced by the plaintiffs, and there can be no doubt that it came from Murphy. At the time of the examination Asselstine was an old man, and spoke of his memory as not being very good. There were other letters shewn him, but they were not written by him, and he could throw no light upon them. But, taking the evidence, and the other facts and circumstances shewn, there is sufficient to justify the conclusion that the two letters, and

indeed all the letters spoken of, were written and sent by Patrick Murphy's directions. It is clear from the testimony that he was in communication with Dodge, and that he was in the habit of sending him the receipts for the taxes, and, as he could not write, he must have employed some other hand to write his letters. There are telegrams also produced purporting to have been sent by him, manifestly referring to some of the letters produced. Asselstine's statements must be taken as a whole, and upon them, taken in connection with the other circumstances, a jury or a Court may fairly and properly conclude that he was the writer of exhibit J.: *Pilkington v. Gray*, [1899] A. C. 401. The letters and evidence also justify the conclusion that at the time the letters were written Patrick Murphy was a tenant paying taxes and rent as spoken of by Foley in his letter of 7th July, 1870, and that he had paid all arrears of rent and taxes up to the year 1881, as he says in the letter of 10th March, 1881. If this be so, then the Statute of Limitations did not commence to run, if it ever commenced to run, until the year 1882, and the transaction of sale and conveyance was in 1884. There was, therefore, no acquisition of title by Patrick Murphy before the date of the conveyance. His tenancy under Dodge continued, and was not turned into a tenancy at will so as to give a start to the statute, until the expiration of a year from the beginning of 1881, at the earliest. Further, there is enough in these letters, read with a certificate as to taxes, to take the case out of the statute, even if it be assumed that there is no evidence of payment of rent after 1872, or even 1871. In that case the tenancy at will would end with the year 1872 or 1873. But within ten years from either date the letters were written and sent, and they contain a distinct acknowledgment of title sufficient to take the case out of the statute. There is more than an oral acknowledgment such as in *Doe Perry v. Henderson*, 3 U. C. R. 386. Commenting on the latter case in *Ryan v. Ryan*, 5 S. C. R. at p. 414, Gwynne, J., said: "But *Doe Perry v. Henderson* does not, nor does any case, decide that the oral acknowledgment by a party in possession, made to the owner or his agent, that the relation of landlord and tenant is then existing between the person in possession and the true owner, is not good evidence as against the person making it of the fact of the present existence of the relationship, so as to give a new departure for the running of the statute." These remarks are a fortiori in the case of an acknowledgment in writing. See also the remarks of Patterson, J.A., in *Workman v. Robb*, 7 A. R. at p. 409.

There is, in addition to the other circumstances, that of Patrick Murphy paying \$900, and taking a conveyance of the premises from E. C. Dodge, a circumstance of great weight in its bearing on the previous relationship of the parties.

The proper conclusion upon the whole evidence is that at the date of the conveyance E. C. Dodge was the true owner of the premises thereby granted. By that conveyance the minerals and the rights thereto were reserved to the grantor, and it is conceded that after the date of the conveyance there were no acts or dealings with the minerals or rights thereto sufficient to deprive the grantor or those claiming under him of their property therein.

The judgment appealed from should be reversed, and judgment should be entered for the plaintiffs in terms similar to those in the judgment pronounced by Lount, J.

The plaintiffs are to have their costs of the action, and inclusive of the trial before Lount, J. No costs in the subsequent proceedings to either party.

JUNE 29TH

C. A.

REX v. LEWIS.

Criminal Law—Manslaughter—Parent's Omission to Provide necessary Medical Treatment for Child—Legal Duty—Lawful Defence—Religious Belief — "Necessaries" — Admission of Evidence—Judge's Charge.

Crown case reserved by FALCONBRIDGE, C.J.

The defendant was convicted of manslaughter in not providing medical treatment for his infant child, who died of diphtheria.

The questions reserved were: (1) Whether the evidence on which the jury might properly find the defendant guilty; (2) whether medical treatment was included in "necessaries;" (3) whether evidence of defendant's religious beliefs was admissible for any other purpose than to shew good character.

The case was heard by MOSS, C.J.O., OSLER, MANLY, NAN, GARROW, MACLAREN, JJ.A.

A. B. Aylesworth, K.C., and W. W. Vickers, for the defendant.

J. R. Cartwright, K.C., and Frank Ford, for the Crown.

OSLER, J.A.—The prisoner was indicted for manslaughter, for that he, being the parent of a certain child named Roy Lewis, then under the age of 16 years

member of his household, and being as such parent under a legal duty to provide necessaries for such child, did then and there, unlawfully and without lawful excuse, omit to provide necessary medical treatment, medicines, and assistance, and other necessaries, for the said Roy Lewis, whereby the death of the said Roy Lewis was caused, etc.

The prisoner's child, an infant between 6 and 7 years of age, and a member of his household, was ill of a disease which turned out to be diphtheria, from a Thursday to the following Tuesday, when it died of such disease. During part of this time it enjoyed what is called by the sect known as Christian Scientists, to which the prisoner belonged, mental treatment, i.e., silent prayer, administered by a Christian Science "demonstrator," but not medical aid or assistance, medicine, or medical treatment, as commonly understood by such expressions, as administered by any legally authorized regular expert in such matters.

The questions to be determined on such a prosecution as is now present are: (1) whether the prisoner was under a legal duty to provide necessaries for the child, which involves the further question whether what was omitted to be provided was a necessity under the circumstances; and (2), if such duty existed, whether the prisoner, without lawful excuse, omitted to perform it.

It is unnecessary, in my opinion, to inquire into what is the nature and extent of the parent's duty at common law to an infant of tender years in his care, charge, and custody, or whether at common law a parent was under an obligation to provide for such an infant medicines or medical aid or treatment—a question upon which there has been much difference of opinion.

The indictment in this case is founded upon sec. 210 of the Criminal Code, which enacts that "Every one who as parent, guardian, or head of a family, is under a legal duty to provide necessaries for any child under the age of 16 years, is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of the child is caused or if his life is endangered or his health or is likely to be, permanently injured by such omission."

The legal duty referred to in this section, for the consequences resulting from the breach of which the prisoner was indicted, is that imposed by sec. 209, "Every one who has charge of any other person unable by reason of detention, disease, sickness, insanity, or any other cause, to withdraw himself from such charge, is under a legal duty to supply that

person with the necessities of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission."

The duty of a parent under secs. 209-210, is contrasted with that under sec. 211 of a master or mistress who has contracted to provide a servant or apprentice under the age of 16 years with necessary food, clothing, or lodging.

The question, therefore, of the prisoner's guilt or innocence, depends upon whether he had or had not omitted, without lawful excuse, to provide necessities, that is to say, necessities of life, whatever they were, for his child; in consequence of which its death was caused. What are or may be such necessities, in any particular instance, is not defined by the Code, but I can see no reason for saying that medical aid, assistance, or treatment, may not, under the circumstances, be necessities quite as much as food and clothing are so. That was evidently the opinion of the Lord Chief Justice in *Regina v. Senior*, [1899] 1 Q. B. 283-292, as regards the duty of a parent at common law. A fortiori, a modern statutory provision admits of as wide a construction. The question, therefore, was one for the jury under the direction of the Judge as in civil cases. It was for the latter to say whether medical aid and treatment or medicines were capable of being necessities within the meaning of the Code, and for the former to determine whether in fact under the circumstances they were necessities. The jury were told that as a matter of law, necessities included medical treatment and assistance when it was reasonable and proper that medical treatment and assistance should be provided—a part of the direction which I do not quarrel with—but also that the medical aid referred to was "that which was authorized, to which was referred to in the Code, not the treatment, if it might so call it, of any particular class or sect in the community." I am not sure that I understand what the learned Judge meant by "authorized" medical aid, assistance, and treatment. It cannot be laid down as a matter of law in dealing with a case of this kind that medical aid, assistance, and treatment must necessarily be of an authorized kind, if that is meant that it can only be administered or furnished by a legally qualified physician or practitioner belonging to one of the recognized schools of medicine. So much, indeed, may be inferred from sec. 212 of the Code. The illness might be of such a character as to make it apparent to an ordinarily prudent person that the assistance of a qualified expert, i.e., a physician or professedly skilled person in such

matters, should be invoked if he had the means of doing so, or it might be such as to suggest that nothing was necessary beyond the attention of a trained or experienced nurse or parent, and the administration of ordinary or well known remedies. This part of the charge, though in my opinion erroneous, cannot, however, be said to have prejudiced the prisoner, because the child received no medical aid or assistance of any kind beyond the Christian Science treatment referred to, and it was proved that this was by reason of the peculiar tenets held by the prisoner, which are opposed to dealing with diseases otherwise than by prayer to the Almighty.

There was evidence on which the jury might find that medical aid and assistance ought to have been provided, and the further questions for their determination were whether it had been in fact provided, and if not whether it had been omitted—neglected—by reason of any lawful excuse. In dealing with all these questions, the jury would have to take into consideration, and they were so directed, the prisoner's knowledge of the child's illness and its serious nature, and his ability to procure and pay for medical aid and treatment.

In giving evidence on his own behalf, the prisoner admitted that the child's illness was such that at one period of it he would have called in a doctor if he had not been a Christian Scientist. Speaking for myself, I must say that in such a case as this a jury ought to be told that no matter how earnestly a parent might believe in the efficacy of Christian Science treatment, as developed in Mrs. Eddy's handbook of the doctrines of the sect, yet if they came to the conclusion that medical aid and treatment was necessary, they ought also to find that it would not be furnished by means of mental treatment by a Christian Science "demonstrator." Persons *sui juris* may by mutual consent, and within certain limits, practise upon each other what experiments of this kind they please, and in some instances and in some kinds of disorders, where the mind of the patient is responsive to the treatment, it may possibly be done with beneficial results. But it would be shocking if in the case of infants or others incapable of protecting themselves, they and the community in which they live were to be exposed to danger from contagious or infectious diseases which the instructed common sense of mankind in general does not as yet find or admit to be curable by means only of subjective or mental treatment.

If I rightly apprehend the scope of the sections of the Code which I have referred to, namely, that they do, where the necessity exists for it, impose the obligation upon a parent

of providing medicine, or medical aid and treatment, for an infant child, some observations of the late Lord Chief Justice Russell in the recent case of *Regina v. Senior*, [1899] 1 B. 283-291, are quite pertinent. In that case the prisoner was a member of a sect called the "Peculiar People," whose religious doctrines as to the treatment of the sick by means of prayer were not dissimilar from those held by Christian Scientists, and were, as the Chief Justice said, certainly, in the ordinary apprehension remarkable. The prisoner's child was dangerously ill, but no medical aid was given it, in consequence of which it died. "Neglect," said the Chief Justice, "is the want of reasonable care—that is, the omission of such steps as a reasonably prudent person would take, such as are usually taken in the ordinary experience of mankind, that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. I agree with a statement in the summing up, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation which would not have been so thought so in a preceding generation, and that regard must be had to the thoughts and habits of the time. At the present day, when medical aid is within the reach of the humblest and poorest member of the community, it can reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect. Mr. Barton contended that because the prisoner was proved to be an affectionate parent, and was willing to do all things for the benefit of his child, except the one thing which was necessary—he ought not to be found guilty of manslaughter on the ground that he abstained from providing medical aid for his child, in consequence of his peculiar views in the matter, but we cannot shut our eyes to the danger which might arise if we were to accede to that argument, for where is the line to be drawn?"

In *The People v. Pierson*, 81 N. Y. Supplement 100, decided since the argument of the case at bar, and similar in its circumstances, the Court say: "The guide to proper conduct must be ascertained by asking what would an ordinarily prudent person, solicitous for the welfare of his child, do under the circumstances of the particular case?" The conviction in that case was quashed for the insufficiency of the indictment. I refer also to *Rex v. Brooks*, 9 Brit. L. R. 13, also a case similar to the present; the conviction was upheld by the Supreme Court against the same contention as the prisoner here puts forward.

I think there was sufficient evidence to warrant the verdict, of all the essential facts, namely, the dangerous character of the child's illness, the necessity under the circumstances for medical aid and treatment, the prisoner's knowledge of both, his omission, without lawful excuse, to provide such medical aid, and the consequence of such omission.

The evidence admitted at the trial of cures believed by the prisoner and other members of the sect to have been performed in "Christian Science," though admitted only for the purpose of shewing his "good faith," was not, in my opinion, relevant or admissible, at all, if, as I think, his motive or belief was not a lawful excuse for omitting to provide what the statute law requires.

I answer the first question in the case reserved in the affirmative.

The second and third I also answer in the affirmative, with the qualifications above stated as to each.

MOSS, C.J.O., and MACLAREN, J.A., gave written reasons for the same conclusions.

MACLENNAN and GARROW, J.J.A., also concurred.

JUNE 29TH, 1903.

C.A.

MOFFATT v. CANADA LUMBER CO.

Water and Watercourses—Dam—Injury to Land by Overflow—Splash Boards—Construction of Consent Judgment in Former Action.

Appeal by plaintiffs from judgment of MEREDITH, C.J., dismissing an action to recover \$10,000 damages for injuries alleged by plaintiffs to have been occasioned by a dam constructed by defendants across the Mississippi river, in the county of Lanark, which caused the water in the river to overflow plaintiffs' lands.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.

G. H. Watson, K.C., and C. McIntosh, Carleton Place, for appellants.

A. B. Aylesworth, K.C., and R. Patterson, Carleton Place, for defendants.

MACLENNAN, J.A.—The only question reserved after the argument was the construction of clause 2 of the judgment

pronounced by consent of counsel on the 31st October, 1889, in a former action.

By that paragraph the defendants were authorized to place splash boards on the part of the dam between C. and D., and for a certain distance between C. and B., but next to C., of a height not exceeding ten inches, and upon the rest of the dam except between B. and C., to within fifteen or twenty feet of C., of a height of seven inches. The effect of this would be that the tops of the splash boards would all be on the same level, that is, 13 feet, 2 inches, above the datum line. The paragraph provided that these boards might be placed whenever the water in the dam was running over that portion between C. and D. to a depth not exceeding eleven inches. Having thus authorized the putting on of splash boards, and having defined at what stage or height of the water they might be put on, the paragraph goes on to say: "But the same are to be removed when the water in the dam exceeds in height the figure at which the said splash boards can be placed thereon, and so from time to time." The learned Chief Justice held that this did not mean that if, when the splash boards were put on, they had the effect of raising the water more than eleven inches above the solid structure of the dam, the boards should be removed. He thought that could not be the meaning of the judgment, for the result would be that the boards must always be taken off in a very short time after they were put on, inasmuch as, if put on when eleven inches were flowing over a dam upwards of 200 feet in length, the immediate effect must be to raise the water several inches at least above the boards. He accordingly held that the defendants were entitled to maintain the splash boards, although water might pass over the top of them, so long as they did not maintain them when the condition of the water was such that the splash boards, if then removed, would not leave more than eleven inches above the dam.

I am clearly of opinion that the judgment of the learned Chief Justice is right.

I think the 3rd paragraph of the judgment throws light upon the meaning of paragraph 2. It provides that the defendants should, during the spring freshets, open certain sluice gates, placed in the dam, down to the bed of the river, so as to allow the escape of the spring freshets; and they were to be kept open until the water should fall in the pond to the height at which the splash boards might be put on.

This stipulation shews that paragraph 2 was intended to enable the defendants to hoard the water when the spring

freshets were over, by placing boards on the dam. Until the water falls to a certain level the sluice gates must be open to the very bed of the river, and no boards may be placed on the dam; but when it has fallen to the level of eleven inches, the sluice gates may be shut, and the boards may be put on. When that time arrives, there is no likelihood of any increase in the volume of water flowing down; but if that should occur, if there should be heavy or continuous rains, so that, if the boards were off, the flow over the dam should be more than eleven inches, then they must be removed until the flood is over. I think the words "water in the dam" in both members of the paragraph mean the same thing, that is, the state or height of the water in the absence of boards.

In my opinion, the appeal should be dismissed.

GARROW and MACLAREN, JJ.A., gave reasons in writing for the same opinion.

MOSS, C.J.O., and OSLER, J.A., concurred.

JUNE 29TH, 1903.

C. A.

BAXTER AND GALLOWAY CO. v. JONES.

Principal and Agent—Insurance Agent—Agreement to Give Notice of Further Insurance—Omission—Liability.

Appeal by defendant from judgment of LOUNT, J, 4 O. L. R. 541, 1 O. W. R. 554, in favour of plaintiffs for the recovery of \$1,000 in an action for damages for injuries caused to plaintiffs by reason of the breach by defendant of an alleged agreement.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, and GARROW, JJ.A.

G. F. Shepley, K.C., and S. F. Washington, K.C., for appellant.

W. R. Riddell, K.C., and L. F. Stephens, Hamilton, for plaintiffs.

OSLER, J.A.—The plaintiffs are an incorporated milling company. The defendant is an insurance agent, through whom the plaintiffs had, in the year 1900, effected insurances in several companies for whom the defendant was acting, upon their mills and machinery, to the amount of \$6,000, of which the sum of \$1,500 was upon a gasoline engine.

In the month of January, 1901, the plaintiffs determined to place an additional insurance for the sum of \$500 on their general mill machinery. They applied to the defendant to procure it, and they alleged that he promised to agree with them to do so, and also to give notice of the further insurance to the insurance companies on the existing risks, a notice which would be necessary in order to prevent the earlier policies from being avoided by the subsequent insurance. The defendant procured the new policy, but negligently omitted to give such notice, and in consequence of such omission the plaintiffs sustained a loss of \$1,000.

The learned trial Judge found the alleged agreement, the breach thereof proved, and that the plaintiffs had sustained damage in consequence to the full amount claimed for which he directed judgment.

The defendant appeals. His points are (1) that if there was any agreement in fact (which he denies) it was gratuitous and without consideration; and (2) that, if the plaintiffs suffered loss in not being able to recover the whole amount of the insurance from the companies, it was not by reason of the defendant's omission to give notice of the further insurance, but because of a different objection to the claim in respect of the insurance upon the gasoline engine.

First, then, as to the agreement. The evidence showed that the defendant was a general insurance agent, through whom in January, 1900, the plaintiffs procured risks to be placed in several companies upon their mill property and machinery to which at this time the power was supplied by means of a gasoline engine, the risk on which was \$1,500, divided equally among four companies. The plaintiff stated that, when these insurances were placed, the defendant said that if it was properly placed, all the policies made concurrently, all the necessary notices of any changes which might be required—in fact he said, “we will take care of you.”

Some changes in and rearrangement of the insurances which had been thus effected were made in December of the same year, which the defendant attended to, and in January, 1901, there were existing insurances on the plaintiffs' property in four companies, amounting to \$6,000, \$1,500, which was on the gasoline engine, distributed as above mentioned.

On the 17th January, 1901, the plaintiffs applied to the defendant to procure for them an additional insurance to the extent of \$500 upon their mill machinery. The defendant placed it in the Millers and Manufacturers Insurance Company for a year from the 21st January. (See his letter

the 19th January to the company, and their answer of 21st (written on the back.) A formal application was sent forward to him by the manager to be signed by the plaintiffs. This the plaintiffs did on the 23rd or 24th January, on which latter day they paid the defendant the premiums on the new insurance. An undertaking given by the defendant on this occasion was also relied on. One of the plaintiffs said: "At the time I signed the application I said, 'Now, Mr. Jones, you will see that the other companies get notice of this additional insurance. You won't forget.' He says, 'that is all right, we will take care of it.'" The policy was shortly afterwards issued bearing date the 21st January, 1901, and sent to the defendant. The same plaintiff met the defendant in the street about a month afterwards and said, "Mr. Jones, did you attend to giving those companies notice?" He said, "Yes, we will attend to it. It is all right."

The plaintiffs' answers on cross-examination made it reasonably clear that on the occasion of effecting the insurance of January-December, 1900, nothing more was said than that if the plaintiffs would give the defendant the whole of this insurance, he would take care of it, and that any notices which might then have been spoken of—a matter which is left very doubtful and uncertain—were such as might be necessary to complete those insurances and make them concurrent. Subsequent or further insurance was not then in contemplation or discussed. In reference to the insurance of \$500 of January, 1901, there was no undertaking or promise on the defendant's part, except that which was proved to have been given on the 23rd or 24th January. By some slip or oversight of the defendant or the clerks in his office, no notice of the new insurance was given to the other companies. A fire occurred on the 26th April following, and these companies insisted that their policies were voided by reason of notice not having been given to them, and they waived themselves of this objection, as the plaintiffs contend, to force a settlement for \$1,000 less than they would otherwise have been obliged to pay for the loss.

The question is, whether, on this evidence, any agreement was made out, for the breach of which the defendant is responsible. The plaintiffs cannot, in my opinion, rely upon anything which took place in January, 1900, when the four policies were effected, because further insurance was not then in contemplation, and his own statement of what the defendant then undertook to do does not go far enough, and is too vague and indefinite, to establish a general engagement on his part to give notice of subsequent insurance effected or

obtained by his means; nor were the policies left in his custody to be looked after. The plaintiffs must, therefore, rely on what took place in January, 1901. The defendant could then undoubtedly at some time promise to give the necessary notices of the new insurance to the companies on the existing policies. Was this a part of the employment he then undertook, or was his employment confined to procuring the new policy, the promise to give notice being an independent subsequent promise made without consideration, and therefore a gratuitous one which imposed no liability in the event of its non-performance?

If the defendant's employment and promise was entirely to do both acts, viz., to procure the new insurance and to give the notices, then, even if it was, as it has been held in the Court below, a gratuitous promise, yet, having proceeded upon his employment, the defendant would be liable for negligently performing it in such a manner as to cause loss or injury to the plaintiffs. He knew the importance of giving the notices, and the effect of the omission to do so upon the plaintiffs' other policies. To stop when he had only obtained the insurance was simply to go so far with the business as to cause a direct injury to the plaintiffs if he went no further and did not follow it up by notice to the other insurers. This cannot, as I think, be regarded otherwise than as actionable misfeasance.

It would rather appear that nothing was said of giving notice when the defendant was first employed or instructed to procure the insurance, but before the business was completed and while the plaintiffs might still have withdrawn, they required the defendant, and the latter undertook, to give notice. Defendant might have refused to assume that duty, and the plaintiffs would then have known that they must look after themselves, or could have withdrawn their application and have sought insurance elsewhere. But the whole business having been ultimately intrusted to and assumed by the defendant, before any part of it had been completed, the plaintiffs have a right to complain that the defendant negligently proceeded with it only so far as to be detrimental to them.

I think the learned Judge rightly regarded the transaction as one of mandate, so that, if the defendant had entered upon the execution of the business intrusted to him, he would have incurred no liability: *Coggs v. Barnard*, 2 Raym. 9, 10; 1 Smith's L. C. 182; but "it is well established that one who enters upon the performance of a mandate or gratuitous undertaking on behalf of another, is responsible not only for what he does, but for what he leaves unfulfilled and cannot rely on the want of consideration as an excuse."

or the omission of any step that is requisite for the protection of any interest intrusted to his care:" Hare on Contracts (1887), pp. 163, 164; Parsons on Contracts, 8th ed. (1893), vol. 2, ch. 11, sec. 2, pp. 103, 104; Thorne v. Deas, 4 Johns. (N. Y. 84; Elsee v. Gatward, 5 T. R. 143. In French v. Reed, 6 Binney 308, the plaintiffs requested the defendants to effect insurances on a vessel from Philadelphia to two ports in the Island of San Domingo. The defendants had insurance made to one port only, which the vessel reached in safety, but was captured on her voyage from that port to the other. It was held that, though the defendants were not bound to accede to the plaintiffs' request, yet when they agreed to do as desired, and through want of due care did it, they were liable for the consequences. See also Eddy v. Livingston, 88 Am. Dec. 122; the cases referred to in the judgment below: and Balfe v. West, 13 C. B. 466; Fish v. Selby, 17 C. B. N. S. 194; Johnston v. Graham, 14 C. P. 9.

The next question is, whether the plaintiffs' loss can be properly held to have been caused by the neglect of the defendant to give notice of the additional insurance.

On the proofs of claim being sent in, the companies at once took the position, the soundness of which has not been disputed, that the omission avoided the policies, and that they were under no legal liability thereon. They did not, however, press this to the extent of an absolute refusal to pay, and after some negotiation and discussion they paid the plaintiffs a lump sum of \$6,000 in settlement, deducting \$1,000 from the claim. The defendant contends that this sum was, in fact, deducted from the insurance on the gasoline engine, in respect of which the adjuster for the companies objected that it was void on the further ground, for which the defendant was not responsible, that there had been a material alteration in the risk, the engine having ceased to be in use for some time before the fire, the power being supplied by an electric motor. I think the evidence leaves little room for doubt that it was the item of the insurance on the gasoline engine which formed the subject of the deduction, and that the second objection I have mentioned was made use of by the adjuster to reduce that item to such a figure as the engine would have been insurable for in its unused condition. From the evidence of the adjuster it is, however, in my opinion, tolerably clear that very little confidence was felt by the companies in the second objection, and that, if that had been the only one, they would not have pushed it so far as to resist payment of the claim. The controlling objection was that of the omission to give notice of the further insurance. It was this, and I think this only, which placed the plaintiffs in the

companies' power and enabled them to dictate the terms which they chose to settle the loss. They said, in effect, "Though we are not liable at all because you did not give us notice of the subsequent insurance, we will pay what is reasonable. But of that we must be the judges, and we think that, under the circumstances, the insurance on the gasoline engine must be reduced by \$1,000." The plaintiff had no option but to accept the situation, for, even if the objection to the particular item could not have been maintained, the overriding objection of want of notice remained and was insisted on, and was sufficient to have defeated the claim in toto. I therefore think that the judgment should be affirmed, and the appeal dismissed with costs.

MACLENNAN, JJ.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., and GARROW, J.A., concurred.

JUNE 29TH, 1911.

C. A.

WITTY v. LONDON STREET R. W. CO.

Damages—Street Railway—Excessive Damages—Second New Trial—Reduction of Damages.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiff, upon the findings of a jury, that \$10,000 damages for injuries sustained by reason of the alleged negligence of defendants in operating their railway, causing a collision between two cars, in one of which plaintiff was seated. He was violently thrown down, and his head and spine were injured. At the first trial of the action the jury awarded plaintiff \$5,500, and a new trial being directed upon defendants' application, the damages were assessed at \$10,000.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for defendants.

W. R. Riddell, K.C., and J. Cowan, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, and GARROW, JJ.A.) was delivered by

OSLER, J.A.—Upon a full examination of the evidence and consideration of the arguments which have been addressed to us, we are obliged to say that there must be a new trial on the ground that the damages are excessive.

At the first trial the damages were assessed at \$5,500. It is unnecessary to say whether or not that amount would have been deemed extravagantly large, if we had been obliged to consider the question on the former appeal. The second jury has now rendered a verdict for \$10,000, nearly twice the amount which the first jury thought reasonable, and upon a balance which cannot justly be said to be materially different from that which the first jury had to deal with. The absence of direct pecuniary loss beyond what is incident to the case of one who sustains a serious accident is extremely slight; it does not mean that it was not led in the lines of such cases as *Phillips v. London and South Western R. W. Co.*, 4 Q. B. D. 555; *5 Q. B. D. 78*, and *Church v. City of Ottawa*, in this case, 22 A. R. 348. So that the verdict has practically been a verdict for the plaintiff's personal injury, pain, and suffering, of time, past and anticipated, and medical attendance. If the court was right to award \$5,500 a year ago, we can see nothing in the evidence at the second trial which could justify the court in inflating the damages as they have done. If the plaintiff desires it, we will, in his own interest and to put an end to the prolonged litigation, which is, doubtless, in some if not a large extent, conducive to his delayed recovery, name a sum to which the verdict may be reduced. If the court in that event the appeal will be dismissed with costs. Otherwise it will be allowed with costs. The costs of both the former trials to abide the event: *Myers v. Sault Ste. Marie Pulp and Paper Co.*, 1 O. W. R. 280; *Ford v. Metropolitan R. W. Co.*, ib. 218.

JUNE 29TH, 1903.

C. A.

TORONTO R. W. CO. AND CITY OF TORONTO.
TORONTO ELECTRIC LIGHT CO. AND CITY OF
TORONTO.

INCANDESCENT LIGHT CO. OF TORONTO AND
CITY OF TORONTO.

OTTAWA ELECTRIC CO. AND CITY OF OTTAWA.

OTTAWA GAS CO. AND CITY OF OTTAWA.

*Assessment and Taxes—Property of Electric Companies—"Land"—
"Rails, Ties, Poles," etc.—"Substructures and Superstructures"
"Rolling Stock, Plant, and Appliances"—Construction of Sta-
tions—Ejusdem Generis Rule.*

Appeals by the companies and a cross-appeal by the corporation of the city of Ottawa from judgments of boards

of County Court Judges constituted under the Assessment Act, confirming or varying assessments of the companies.

The appeal was heard by MOSS, C.J.O., OSLER, MANAN, GARROW, and MACLAREN, J.J.A.

J. Bicknell, K.C., and J. W. Bain, for the Toronto W. Co.

J. S. Lundy, for the Toronto Electric Light Co.

H. O'Brien, K.C., for the Incandescent Light Co. Toronto.

G. F. Henderson, Ottawa, for the Ottawa Electric and the Ottawa Gas Co.

J. S. Fullerton, K.C., for the corporation of the city of Toronto.

A. B. Aylesworth, K.C., for the corporation of the city of Ottawa.

OSLER, J.A.—These are appeals by the various companies under sec. 84 of the Assessment Act, from decisions of boards of County Court Judges, and one question common to all of them is as to the proper construction of sec. 18, sub-sections (3) and (4), of the Assessment Act, as substituted for former sec. 18 of that Act, by the Assessment Amendment Act, 1902, 2 Edw. VII. ch. 31.

The new section is a further attempt to settle some of the difficulties arising out of the former legislation upon the same subject, and it must be said that it has been so expressed as to raise, in more than one respect, plausible doubts of its own meaning. Sub-sections (1) and (2) provide, generally as to land, where it shall be assessed; and especially as to the land of companies, as follows: "The land of companies for supplying water, heat, light, and power to municipalities and the inhabitants thereof, telephone companies, and companies operating street railways and electric railways, shall, in municipalities divided into wards, be assessed in the ward where the head office of such company is situated, if such head office is situated in such municipality; but if the head office is not situated in such municipality then the assessment may be in any ward thereof."

Sub-section (3) then provides as to certain kinds of property of the companies mentioned in sub-sec. (2) that: "rails, ties, poles, wires, gas, and other pipes, mains, conduits, substructures, and superstructures upon the streets, roads, highways, lanes, and other public places of the municipalities belonging to such companies, shall be 'land' within

ning of the Assessment Act, and shall, when and so long as in actual use, be assessed at their actual cash value, as the same would be appraised upon a sale to another company possessing similar powers, rights, and franchises in and from the municipality, and subject to similar conditions and burdens, regard being had to all circumstances adversely affecting their value, including the non-user of any such property."

The remainder of the section need not be quoted.

Pausing here, it will be seen that the definition of "land," "real property," and "real estate" in sec. 2, sub-sec. (9), of the Assessment Act, is not affected. These are, so far, merely amended or explained by the new enactment. They "include buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty," and therefore all the property of any such company not upon the streets, alleys, highways, lanes, and other public places of the municipality, would remain assessable as theretofore, or as now provided for by sub-sec. (2) of the new Act.

Then comes the sub-section which causes the principal difficulty:

(4) "Save as aforesaid, rolling stock, plant, and appliances of companies mentioned in sub-section (2) hereof, shall not be land within the meaning of the Assessment Act, and shall not be assessable."

The contention of the companies is that the effect of this sub-section is to exempt from assessment all their plant and appliances of every description, though otherwise land within the meaning of sub-sec. (9) of sec. 2 of the Act, and hitherto doubtfully assessable as such, which is not upon the streets or roads of the municipality. It is hardly necessary to point out how novel and extensive an exemption is sought to be produced by this construction, nor how clear must be the grounds which should compel us to adopt one so opposed to the general principles of the Assessment Act.

We can see from the terms of sub-sec. (3), read in the light of former legislation and the decisions of the Court thereon, that its main purpose is to provide for the assessment of the net property of these companies, and we know that the rolling stock of the electric street railways had been held to be land and assessable as such, within the meaning of sec. 2, sub-sec. (9): *Kirkpatrick v. Cornwall Electric Street R. W.*, 2 O. L. R. 113.

Before the passage of the Act of 1902, 2 Edw. VII. ch. 31, rails, ties, poles, wires, gas and other pipes, mains, conduits, and probably, as included in these words, any other sub-structures and superstructures upon the streets and highways

of a municipality, belonging to the companies mentioned in sub-sec. (2) of the new sec. 18, had been held to be land within the meaning of the Assessment Act, and assessable as such. The first branch of sub-sec. (3), therefore, merely affirms the existing law. The difficulty was as to mode of assessing such property, and it is this difficulty which is sought to be remedied by sub-sec. (2), and the second branch of sub-sec. (3).

The rolling stock of electric railways had also recently been held for the reasons given in *Kirkpatrick v. Cornwall Electric Street R. W. Co.*, been held assessable as land within the meaning of sec. 2, sub-sec. (9), of the Assessment Act, it being something forming part of the realty.

No one has ever contended that plant and appliances of the nature of fixtures, or forming part of the realty belonging to any such companies, situated on their own grounds in their head offices buildings, or elsewhere than on the streets, were not assessable. It is contended that by force of sub-sec. (4) of the new sec. 18, not merely rolling stock of street and electric railways, but all plant and appliances of those railways and of all other companies mentioned in sub-sec. (2), elsewhere than on the streets, though apart from such sub-section they would be assessable as land, shall be exempt from taxes, and shall not be land or assessable as such. What the legislature intended to remedy is very plain. The question is, whether, in applying the remedy, they have used language which must be read as creating a new general exemption of property the liability of which to taxation has never been disputed. No doubt, the language used goes far to create this new difficulty, and if it is not fairly capable of being read otherwise than as the appellants contend for, we must so construe it, no matter how extravagant and unjust the result we may be forced to.

"Rolling stock, plant, and appliances." Are these general terms, meaning the rolling stock of the railway companies, and also the plant and appliances of the railways and of all the companies, other than that included in sub-sec. (2)? Or are we to apply to them the well known rule of construction, and read plant and appliances as *eiusdem generis* with rolling stock? I am of opinion that the case is for the application of that rule. It is intended by sub-sec. (4) to make it clear that rolling stock of the railway companies' plant, which is found and used on the streets, shall not, by reason of the wide words "substructure" and "superstructure" used in sub-sec. (3), be liable to taxation as land. The intention was to undo the effect of our decision in the *Kirkpatrick* case, and to declare that such rolling stock shall not be, as up to that time it had not been, liable to taxation.

the general words "plant and appliances," which follow the particular specific term, "rolling stock," ought, in my opinion, to be read as restricted to the same genus as the latter, the whole having the meaning of rolling stock, rolling plant, and appliances, such as tools in connection with or belonging to such stock. I see nothing to forbid such a construction, and a very great deal to commend it, having regard to what we know of the evil intended to be remedied by the legislation, and the, I may say, novel and extraordinary results which would flow from a contrary construction. But it is said that to confine the meaning of the sub-section in this manner, is to make it of no force as regards the companies which have no rolling stock, but have plant and appliances of a different kind, elsewhere than on the street. The answer is, that the word "companies" in sub-sec. (4) is to be read distributively. The sub-section is not in terms applied to all the companies mentioned in sub-section (2). Its language is, rolling stock, plant, and appliances of the companies mentioned in sub-sec. (2), that is to say, of companies which have rolling stock.

If I am right in saying that the general rule of construction I have mentioned is *prima facie* applicable to this collocation of terms, we ought not to construe them otherwise merely because the effect of doing so will give them no application to the other companies, unless the language of the sub-section in other respects shews that the latter were meant to be comprehended, which I think is not the case. The principal ground of appeal, therefore, in my opinion, fails.

A further objection was taken by the Ottawa Electric Company that their lamps, hangers, and transformers, were not "superstructures upon the streets," within the meaning of sub-sec. (3). I have felt some doubt on this point. The company in which that word is found seems to require its limitation to something fixed and permanent in its nature, much so at least as "substructure" and poles, wires, and main. Lamps, hangers, and transformers are more aptly described, if I understand their connection with the equipment, as apparatus, though no doubt, in one sense, structures, as every mechanical contrivance is, the parts of which are assembled to make it. Nevertheless, they form, however easily removed and transferable from one place to another, parts of the permanent and essential street plant.

My learned brothers agree with the finding of the board of County Judges, and I cannot, with any confidence, come to a different conclusion.

As regards the appeal of the city of Ottawa in respect of the gas company's assessment, I cannot see on the evidence any reason to interfere with the amount to which the County Judges reduced it.

I must add that in these assessments appeals, where the parties contemplate carrying them beyond the board of County Judges, more care should be taken to have the evidence before the board reported, and the contentions of the parties properly formulated there, than has been done in some of the matters brought before us.

MACLENNAN, J.A., gave reasons in writing for the above conclusions.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurring.

JUNE 29TH,

C. A.

ANDERSON v. ELGIE.

Dower—Assignment of — Mortgaged Lands — Fraud of Mortgage — Mistake—Subrogation—Merger — Equitable Estate — Mortgage — Seisin.

Appeal by defendant from judgment of LOUNT. J. (O. W. R. 550) in favour of plaintiff in action for dower.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

R. Bayly, K.C., for appellant.

J. Bicknell, K.C., for plaintiff.

MOSS, C.J.O.—The plaintiff claims to be entitled to a dower out of the east half of lot 27 in the 5th concession of the township of Luther.

He asserts title thereto as the assignee or grantee of Sarah Morrison, the widow of John Morrison, a former owner of the property.

The defendant is in possession of the premises under an agreement for the purchase thereof from the Agricultural Savings and Loan Co., mortgagees under an indenture of mortgage made by John Morrison and dated the 8th of February, 1881. At the time of the execution of the mortgage John Morrison and Sarah Morrison were man and wife, but she was not a party to nor did she execute the mortgage, which John Morrison is described as a widower. The mortgage was given to secure an advance of \$2,500 to John Morrison, who appears to have made a statutory declaration that his wife had died in November, 1880.

At the time of the application for the advance and the execution of the mortgage to the company, the premises were subject to a mortgage in fee made by John Morrison, his wife joining to bar her dower, in favour of the Canada Land Credit Co. This mortgage is dated the 30th January, 1879, and registered the 11th February, 1879. A portion of the advance from the Agricultural Savings and Loan Co. was applied in payment of the mortgage held by the Canada Land Credit Co., and thereupon they executed a discharge of the mortgage the 1st March, 1881. On the 5th March, 1881, the Agricultural Savings and Loan Co. caused the discharge to be registered in the proper registry office.

By indenture made in pursuance of the Short Forms of Conveyances Act, between John Morrison, the grantor, his wife, Sarah Morrison, who joined therein for the purpose of barring her dower, and the plaintiff, the premises were granted and conveyed to the plaintiff, and it is under this instrument that the plaintiff now claims dower as assignee of Sarah Morrison.

The plaintiff thus became entitled to the equity of redemption, and it is said became liable, as between himself and John Morrison, to pay the Agricultural Savings and Loan Co.'s mortgage, but this does not very clearly appear. Neither the plaintiff nor John Morrison paid the principal money secured by the mortgage, which fell due and became payable on the 1st February, 1886, and the Agricultural Savings and Loan Co. took proceedings under the power of sale, and, by agreement dated the 27th February, 1892, contracted to sell the premises to the defendant, who has since been in possession as purchaser.

John Morrison died on the 19th September, 1901, leaving Sarah Morrison surviving him; and this action was commenced on the 11th September following.

The case was tried by the late Mr. Justice Lount, who gave judgment in the plaintiff's favour, holding him entitled to recover dower out of the premises.

Upon the appeal a number of objections were presented by counsel for the defendant.

The first was that, at the date of the indenture under which the plaintiff claims, Sarah Morrison was not entitled to an inchoate right of dower in the premises which could prevail over the Agricultural Loan and Savings Co.'s mortgage, and that thereafter no such right or any right of dower vested in her; and the point seems well taken.

It is asserted that at no time was John Morrison ever mortgaged in fee of the premises so as to entitle his wife to dower at common law, but it is only necessary to consider the state

of the title from and after the execution of the mortgage to the Canada Landed Credit Co. on the 29th January, 1879.

As the law then stood, Sarah Morrison, having joined in the mortgage and thereby barred her dower, became entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled. And so long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity of redemption, either wholly, by an absolute conveyance, or partly by a mortgage: *Fitzgerald v. Fitzgerald*, 5 O. L. R. 279.

And this vested right was not interfered with or affected by the Act 42 Vict. ch. 22, which became law on the 1st March, 1879: *Martindale v. Clarkson*, 6 A. R. 1; *Beavins v. Maguire*, 7 A. R. 704.

Therefore, the mortgage to the Agricultural Savings and Loan Co., though made on the 8th February, 1881, was a conveyance to that company of the premises free from any claim to dower on the part of Sarah Morrison. And her right to dower was thus reduced to dower in any interest in the premises to which her husband might die beneficially entitled. It was argued that the effect of the discharge of the Canada Landed Credit Co.'s mortgage was to revert the mortgaged estate in John Morrison for a period sufficient to restore his wife's right to dower—that there was a momentary seisin, and that the wife's dower vested.

But the mortgage to the Agricultural Savings and Loan Co. had been executed and delivered for some weeks before the execution of the discharge, and the effect of the registration thereof was not to revert the premises in John Morrison but in the loan company, to whom he had conveyed them: *R. S. O. ch. 136, sec. 76*.

The prior mortgagees' estate was thus replaced in the parties best entitled to it, viz., the Agricultural Savings and Loan Co., whose money had been advanced to pay the mortgage claim on the premises. It thus appears that the estate in the premises was in the Agricultural Savings and Loan Co., and of the defendant as their purchaser and assignee in equity, is paramount to any claim of dower on the part of Sarah Morrison or her plaintiff claiming through her.

In this view it is unnecessary to deal with the other contentions.

The appeal should be allowed and the action dismissed with costs.

MACLENNAN, J.A., gave reasons in writing for allowing the appeal.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JUNE 29TH, 1903.

C. A.

CITY OF GUELPH v. GUELPH PAVING CO.

Municipal Corporations—Water Supply—Use of Water by Contractors for Paving Streets—Implied License—Absence of Contract—By-law—Rates—Damages—Penalty.

Appeal by defendants from judgment of FALCONBRIDGE, J., in favour of plaintiffs for the recovery of \$200 in an action for the price of water from the mains of plaintiffs and by defendants in the construction of cement walks.

E. E. A. DuVernet and B. H. Ardagh, for appellants.

J. P. Mabey, K.C., for plaintiffs.

The judgment of the Court (OSLER, MACLENNAN, GARW, and MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—The statement of claim alleges that the defendants constructed certain sidewalks for the plaintiffs, from the years 1895 to 1900, inclusive; and that for the purpose thereof plaintiffs supplied to the defendants at their request water from the plaintiffs' waterworks, the water from which is supplied by plaintiffs to the various classes of consumers and users in the city, upon payment of water rates therefor. That the charge made by the plaintiffs and payable by the defendants at the rate of 10 cents for each cubic yard of walk, in making of which the water was used, which is the regular charge or price of the plaintiffs for water used for the said purpose, amounts in the whole to the sum of \$241, which defendants have not paid. The plaintiffs gave credit for \$241, moneys of the defendants in their hands, due and unpaid on account of contracts between the parties.

The defendants put the plaintiffs to proof, and also allege that it was understood and agreed between the parties that the plaintiffs should supply the necessary water free of charge, and that no charge or claim was ever made for payment for water used by them in construction of the walks, until the autumn of the year 1900.

At the trial it was proved that the several contracts for construction of cement sidewalks during the years mentioned in the statement of claim, provided inter alia that defendants should provide and supply all the necessary materials and labour, tools and implements of every description, and everything required for the due and proper laying of the walks in accordance with the specifications. The contracts are silent as to water. From time to time, and in many localities, the

defendants obtained such water as they needed for the foundation and mixing the concrete from the hydrants or other taps of private consumers along the street where they were working. This was known to the city engineer, to whose satisfaction the works contracted were required to be done. The engineer said he was constantly along there, and knew it to be the usual practice. He made no remonstrance or objection. He made a statement to the council in 1896 for the year 1895, shewing that the defendants had used water in the construction of 968 yards, which made no return for subsequent years, being told (he testified by the city treasurer) that the defendants were not paying the rates.

The chairman of the waterworks committee of the council in the years 1895, 1896, and 1897, seems to have been of the opinion that the defendants were using the water in this way, and on one occasion it was mentioned in the committee, but no objection was made to it and nothing was done, and from year to year until the autumn of 1900, the defendants' claims under the contracts were settled and paid, without any demand for a reduction on account of the water. Plaintiffs' engineer testified that 10 cents per cubic yard was a reasonable sum to charge the defendants, comparing it with that charged for building rates. One of the defendants said that they had never expected to pay anything for water, and had not tendered the footing of a charge being made for it. He had frequently asked various chairmen of the waterworks committee if they could use water from the city hydrants, "if they were for it," and was told they could do so. They appeared, however, to have confined their user to that taken from the hydrants or taps on private premises as being more convenient. Water was thus used in the construction of at least a portion of their work.

The city waterworks by-law contains a long schedule of rates chargeable to users of water for various specific purposes, but none applicable to the purposes for which the water was used by the defendants.

In my opinion, the action fails. The evidence makes it quite clear that there was no such agreement as alleged in the statement of claim to pay for the water used by the defendants. They used it either because they thought they had the right to do so in carrying out the city contracts, or because the plaintiffs were assenting to such user.

The plaintiffs' waterworks system was at first managed by commissioners, under their special Act, 42 Vict. ch. 77, and it was stated that the corporation assumed management under the powers conferred by sec. 45

ct. Section 11 provides that the distribution and use of water in all places and for all purposes where the same may be required, shall be regulated, and the prices for the use thereof, and the time of payment therefor, fixed. And this was done under the plaintiffs' by-law of 6th January, 1885, in force now, and during the periods in question.

No doubt the omission to fix by by-law any rate applicable to the user of the water for purposes for which the defendants required it, would not deprive the plaintiffs of the right to recover damages for its unlawful user, if the special Act made no provision on that subject. The water was the plaintiffs' property, and though, in the absence of a rate, there could be no promise, express or implied, to pay any particular rate, the value of what might be unlawfully taken would have to be paid as damages, as in the case of any other property unlawfully appropriated. But I think that, on the evidence, it ought to have been held that the plaintiffs were consenting to its user without charge. It must be inferred that they knew that the defendants were using it from time to time. The quantity used was comparatively trifling.

The plaintiffs never made claim upon them for it, and settled all demands under their contracts with them from year to year, without demand or deduction for the water taken.

Regarding the action as one for damages for unlawful user, the only form in which as a common law action it can be maintained, I think the evidence fails to support the case; and that the action ought to have been dismissed. Even if the plaintiffs were entitled to recover something, I think it could be a much smaller amount than has been awarded to them. Fifty dollars, it appears to me, would be a very liberal allowance.

There is a further ground on which, as it appears to me, the plaintiffs cannot succeed, viz., that sec. 17 of the Act provides the remedy to be adopted in the case of the wrongful abstraction of the water. This section enacts that if any person shall lay any pipe or main to communicate with any pipe or main of the waterworks, or in any way obtain or use any water thereof, without the assent of the commissioners, he shall forfeit and pay to them for waterworks purposes the sum of \$50, and also a further sum of \$5 for each day or part of a day or night or part of a night during which such pipe or main shall so remain, which said sum with costs of suit may be recovered by civil action in any Court in the Province having civil jurisdiction to the amount. These sums, though the nature of penalties, are recoverable for waterworks purposes entirely. They are recoverable from time to time

so long as the unlawful acts of taking the water or maling the pipes are committed or continued. In fixing penalties, the legislature no doubt had in view the difficulty there would be in providing with any degree of exactness the quantity of water wrongfully taken, or ascertaining the price by any schedule of rates, and therefore made the compensation large enough to be a full compensation for any injury inflicted by taking the water in this manner.

The appeal is allowed with costs, and the action dismissed with costs.

JUNE 29TH,

C. A.

McLAUGHLIN v. MAYHEW.

Specific Performance—Contract for Purchase of Land—Oral Contract—Possession by Purchaser—Part Payment—Conveyance Executed but not Delivered—Escrow—Statute of Frauds—Reference to Title.

Appeal by defendants from judgment of ROBERTSON, J., 1 O. W. R. 308, in favour of plaintiff in action to compel specific performance of an agreement for the purchase of a lot in the village of Huntsville containing one-eighth of an acre.

G. Lynch-Staunton, K.C., for appellants.

W. H. Blake, K.C., for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, and ROW, MACLAREN, JJA.) was delivered by

OSLER, J.A.—The facts established by the evidence are briefly as follows:—The defendants Fairy Lodge No. 1, Independent Order of Odd Fellows, Huntsville, on the 1st of June, 1900, being the owners of lot No. 56 on the south side of Main street in the town of Huntsville, then vested in Wilkinson, F. J. McCollum, and the defendant Oscar V. Mayhew as their trustees, passed a resolution authorizing “the trustees to sell the lot to the best of their ability.”

On the 16th July, 1900, the defendants Whaley and Mayhew were elected and appointed trustees in the room and stead of Wilkinson and McCollum, “who had retired from office,” and on the 24th July, 1900, the three defendant trustees acting in pursuance of the resolution of the 16th July entered into an oral agreement to sell the lot to the plaintiff for \$365. The plaintiffs paid \$5 on account of the purchase money, and the balance was to be paid on the delivery

deed. It was expected that the agreement would be carried out at once, though time was not made of the essence of the contract. The defendants were told that the money would be placed in the hands of the plaintiff's friend, one Paget, to pay over as soon as the deed was ready; and he requested Paget to see that he got a deed in proper form. An instrument purporting to be a conveyance to the plaintiff in the usual form, bearing date the 24th July, was on that day, or a few days afterwards, prepared by one of the trustees, and signed by all of them, and produced to Paget for the plaintiff. Paget said it was necessary "to shew in the registry office that the new trustees had been appointed," and that the deed should be under the seal of the defendant corporation. He had the residue of the purchase money in his hands ready to be paid over on this being done. A certified copy of the resolution appointing the new trustees was prepared and signed by lodge officials, but, owing to the seal having been broken or injured, it was necessary to procure a new one. This was mislaid in the express office, and some delay occurred in consequence. Meantime the plaintiff, to the knowledge of the defendants, entered into possession of the lot, rented for a month to two persons for the purpose of putting up a "merry-go-round," afterwards to several travelling medicine men, and received rent from the persons who thus occupied it.

In November, 1900, the collector of taxes for the year was referred by the trustees to the plaintiff for payment thereof, and he paid the same, and he was assessed for the lot as owner and occupier in the following year.

During the delay which occurred in procuring the new seal, the plaintiff had withdrawn the money from Paget's hands to use it for some other purpose, but when the deed and certified copy of the resolution were again produced duly sealed, the trustees were told that if immediate payment was required it would be made. They were content to let it remain at interest till called for, and this, as the trial Judge has found, was agreed to; the deed in the meantime to remain in the hands of the trustees. In April, 1901, the trustees, without further communication with Paget or the plaintiff, sold and conveyed the lot for \$380 to the defendant Reid, who purchased with notice of the plaintiff's title, and after the registration of the *lis pendens* in the action.

The defendants pleaded that there was no agreement in writing to sell the land, and relied as a defence upon the provisions of the Statute of Frauds.

The plaintiff contended that the instrument executed by the trustees was a sufficient memorandum in writing of the

contract, and, if not, then that the taking possession sufficient part performance of it to prevent the application of the statute.

The learned trial Judge found that there was an agreement between the parties, complete in all its terms, that the instrument signed by the trustees was a memorandum thereof sufficient to satisfy the requirements of the statute. Specific performance thereof was accordingly adjudged.

The question whether a conveyance executed as a conveyance in such case was in escrow (*Phillips v. Edwards*, 10 Beav. 440) and retained in the vendors' own possession can be handed to the vendee on payment of the purchase money can be regarded as a note or memorandum in writing of a previous parol contract between the parties for the conveyance of the land on the terms mentioned in the deed, is one of nicety, having regard to the state of the authorities on the subject. It would appear to have been decided in the affirmative by *Spragge, C.*, in *Gillatley v. White*, 18 O. R. 596. But in *Phillips v. Edwards*, *supra*, which was not overruled in that case, the Master of the Rolls seems to have been of a different opinion, although its expression was not necessary in the case before him, inasmuch as there was no conveyance in parol agreement between the two parties. The same observation applies to *McClung v. McCracken*, 3 O. R. 596. *Gillatley v. White* is referred to without approval in the cases of *Moritz v. Knowles*, [1899] W. N. 40, reversed on appeal, C. A., ib. 83, *Kopp v. Reiter*, 146 Ill. 437, 22 L. R. 43, *Freeland v. Charnley*, 80 Ind. 132, and *Cagger v. L. 43 N. Y. 550*, are also opposed to the plaintiff's contention, although in these cases, also, there had been no antecedent parol contract complete in all its terms. On principle there is some difficulty in maintaining the proposition, at all events where the conveyance relied upon contains no recital of an alleged agreement (see *Re Hoyle*, *Hoyle v. Hoyle*, 1 Ch. 84), that an instrument purporting to be an execution of a contract is evidence of a prior parol contract in the same terms. If the conveyance is the completion or the termination of the parol agreement, then, as the Master of the Rolls says, the latter has ceased to exist and is merged in the deed. If the parol agreement is the matter which the Court is to investigate, the deed is the matter which the Court is to investigate, and the terms of which it is to investigate. If the deed be delivered in escrow to an agent of the vendor, and retained by the vendor himself, until the performance of the condition, such as payment of the purchase money, or the absence of the statutory evidence of a prior agreement,

ould seem to be nothing to prevent the vendor, while the
 dition is unperformed, from recalling or cancelling it.
 e also Brown on the Statute of Frauds, 5th ed. (1895), sec.
 t (b); and Reed on the Statute of Frauds (1888), vol. 1,
 . 388. In the case at bar there was a parol agreement as
 mplete in all its terms as such an agreement can be, and
 instrument at first executed and prepared by the trus-
 s was inoperative as a conveyance of the estate, not being
 der seal, and perhaps for another reason. The appearance
 icates that it was not even under the seal of the trustees,
 ough there is an expression in the evidence of Paget which
 ms opposed to this. If that were the case, one of the diffi-
 ties suggested by the Master of the Rolls in *Phillips v.*
wards, in the way of regarding it as being, in its former
 dition, a note or memorandum of the agreement, would
 renewed, and the recent case of *Re Hoyle, Hoyle v. Hoyle*,
 192] 1 Ch. 84, shews what is the maximum required in the
 y of evidence of the parol agreement. As at present ad-
 d, however, considering the evidence before us, I hesitate
 affirm the judgment upon the ground on which the learned
 l Judge has placed it, because the other ground on which
 plaintiff relies, namely, the part performance of the agree-
 nt by entering into possession, is, in my opinion, well taken,
 makes it unnecessary to consider that point further.
 s true that there is no evidence that at the time of making
 agreement anything was said about taking possession,
 it was an agreement intended to be carried out at once,
 it was the fault of the defendants that it was not. It
 expected that the difficulty—a formal one—which stood
 the way of their doing so, would be immediately removed,
 the plaintiff, having deposited the purchase money in
 hands of a third person to be paid over, not unreasonably
 ered into possession of the lot. He did so on the faith
 the contract, and openly and continuously for some time
 ained in visible possession by his tenants. There was
 hing equivocal about the possession thus taken. It was
 rable to the agreement, and to that only, and being
 rn and not denied to have been so taken and maintained
 the knowledge of the defendants, and without objection
 their part, it ought, under the circumstances, to be as-
 sed to have been taken with their assent. It was, I think,
 rly of such a character as to exclude the operation of the
 ute: *Fry on Specific Performance*, 4th ed., 1903, secs.
 , 602, 603, and the cases of *Cameron v. Spiking*, 25 Gr.
 , and *Ungley v. Ungley*, L. R. 4 Ch. 73, may be referred

The judgment should be varied by directing a re-
as to title, if the plaintiff desires it, but, subject to the
appeal should be dismissed with costs.

JUNE 29TH

C. A.

GRIFFITHS v. HAMILTON ELECTRIC LIGHT
CO.

*Master and Servant — Injury to Servant — Death from Electric
Shock—Electrical Works—Dangerous Place—Absence of
Evidence as to Cause of Death—Inference—Evidence to
to Jury—Negligence.*

Action for negligently permitting defendants' wires, etc., to be in an unsafe and dangerous condition whereby plaintiff's son, working among them under their and directions of defendants, lost his life. Plaintiff had appointed administrator of his son's estate.

The action was tried before FALCONBRIDGE, C.J. and jury. It was ruled that there was not sufficient evidence to how the accident happened, and the action was dismissed. Plaintiff appealed.

G. Lynch-Staunton, K.C., for plaintiff.

M. Brennan, St. Catharines, for defendants.

The judgment of the Court (OSLER, MACLENNAN and LAREN, JJ.A.) was delivered by

OSLER, J.A.— . . . The deceased was a labourer and with his fellow workman, one Higgins, was on July, 1902, ordered to cut a trench or opening at two feet in the concrete floor of defendants' power house. The floor may be said to be covered with the various sorts of electrical apparatus used for the development and transmission of electric power, such as cables, wires, switch-boards, transformers, etc., access to and among which is obtained by alleys or alley-ways, some passing east and west lengthwise through the room, and others transversely, called the north and south alleys, crossing the former from one side of the room to the other. On each side of the room are the switch-boards, from each of which depend two loose coils of wire, the ends of which are attached to a handle. These wires pass through the switch-board, connected through the transferer with the generator. The trenches were to be cut in the transverse or north and south alleys at the east end of the room. The cables in the

adjoining the north alley were dead, and there was no danger in working there. Those in the south alley were alive. According to the evidence of Higgins, he and his fellow workman were directed to clear up and remove the rubbish which would be made in cutting the trench in the concrete, which, from its hard and brittle character, was apt to fly and make litter in every direction. They were engaged in doing this when the accident happened. Higgins said that he had gone into the east alley, i.e., that part of the east alley which was east and immediately opposite or at right angles to the south alley, in which one of the trenches had been cut, and was sweeping out the litter from there towards the trench, when he suddenly became unconscious, receiving, as there can be no doubt he in some way did, a severe electric shock. He had last before this noticed the deceased stooping over the trench about four feet distant from him. Live wires, it may be said, were proved to have been in the east alley within arm's length of any one working in the trench. The bodies of both men were discovered lying near each other just east of the switch-board in the east alley, that of Higgins being a little above to the north of the two switch-boards. From the evidence it may also be inferred that the deceased in some way received an electric shock, and that this was the cause of his death. Whether this was at the same time as Higgins or immediately or soon afterwards, does not appear.

To prove defendants' negligence it was shewn that there was a break or rupture in the insulation of the loose loop or coil of cable, hanging from the switch-board directly over where Higgins was lying, such as might be caused by its being bent backwards and forwards in its constant use. There was also evidence that, having regard to the enormous voltage passing through the wires, their insulation was quite insufficient for the purpose of safety to any one working among them, in an unprotected condition, even though he did not actually come into contact with them; and also that the depending loop or coil might easily have been better guarded than it actually was. . . .

Whatever may be said of the case hereafter, when the evidence on both sides is in, I think that as it stood at the close of plaintiff's case there was evidence in support of it which could not properly have been withdrawn from the jury. The men were not forbidden to go into the east alley, and it would be quite permissible for the jury to find, on the evidence of Higgins, that their instructions were such as to require them to clean up any litter or rubbish which got there in the course of their work. I by no means intend to say that the jury would be bound to infer this, or that there was

not excluded, such as the putting up the slab or lath as the last step, which would justify the contrary inference. As to the places if the men were working in the place where they were found, one of them dangerously shocked and later dead—they were working there without having had special warning in the subject in a place where a single guarded movement might bring either of them in contact with the exposed wire, or even if, as one witness suggests, the exposed wires had occurred at the moment from a wire inadequately insulated or inadequately guarded. There is no reason that I can see to look further and imagine possible negligence on the part of the men themselves. They were sent or permitted to go into a place where one of the very highest dangers existed, and defendants to their servants in such circumstances is aptly expressed in the language of the late Chief Justice of Canada in *Citizens' Light and Power Co. v. Leggett*, 29 S. C. R. 101. See *Minter v. Bealston*, 156 U. S. 391, cited in *Shuman and Reisdorf on Negligence*, 4th ed., sec. 189, note.

There was evidence that the death of the deceased was owing to the neglect of some precaution of this nature to the damaged condition of the wire close to which the body was found. I think it is quite immaterial whether both men received the shock concurrently, one through the other or whether Griffiths's shock came after his fellow servant been struck. It is enough that he was not wrongfully injured where he met with his injury.

The appeal should be all well with costs, and the order of the last trial, to be paid by defendants.

JUNE 29TH, 1911.

C. A.

OTTAWA ELECTRIC CO. v. CITY OF OTTAWA

Contract—Supply of Electric Light—Unforeseen Accident through no Default of Company—Construction—Breach—Damages—Penalty.

Appeal by defendants from judgment of BOYD, C. (W. R. 508) allowing appeal of plaintiffs, and dismissing appeal of defendants, from report of local Master at Ottawa. The action was brought by plaintiffs to recover \$18,666 alleged to be due by defendants for electric lighting of city of Ottawa under a contract.

The controversy was as to the legal relationship of parties in consequence of the destruction of the work of plaintiffs, in common with a large part of the city of Ottawa.

the great fire in April, 1900. The Chancellor read the contract as meaning that if no light was furnished from an unforeseen accident, there was to be no pay and no penalty for such time; when light began to be furnished, pay began at once; and, in any event, the company all the while being in no default.

B. Aylesworth, K.C., and T. McVeity, Ottawa, for the defendants.

F. Shepley, K.C., and G. F. Henderson, Ottawa, for the plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLEOD, GARROW, J.J.A.) was delivered by

GARROW, J.A.—I agree with the judgment of the learned Chancellor upon the question of the construction of clause 7 of the agreement.

The clause in question, the cause of all the difficulties between the parties, is so obscure that no one, I think, can feel assured that he has correctly interpreted it, but the construction placed upon it in the judgment of the Chancellor has at least the merit of apparent fairness, inasmuch as it will enable the plaintiffs to be paid for the actual services rendered, while relieving them from a heavy penalty as the result of what was pure misfortune, in the destruction of their plant in the great fire of April, 1900.

The chief stumbling block in this clause 7 is, of course, the use of the words "in any event," or rather the use of these words as contrasted with the words which follow later on in the clause, which state that the report of the superintendent shall be final as to the number of lamps not kept lighted by the plaintiffs "according to the terms of this agreement." Reporting, it is clear that the superintendent is to be governed by the terms of the agreement, and one clear term of the agreement is that the plaintiffs are to be excused from lighting and keeping lit all or any of the lamps in question when prevented by an unforeseen accident. It would certainly be an odd thing if the plaintiffs were to be held excused from lighting lamps as the result of the destruction of their plant by an unforeseen accident of the fire, and yet be held liable to the heavy penalty of fifty cents a lamp, or some hundreds of dollars each night, until the plant was restored. Mr. Aylesworth, as counsel for the defendants, urged that such a result was perfectly reasonable—that it was of the highest importance that a continuous service should be secured for the proper protection of person and property in the streets of the city at night. Well-lit streets are, of course, of great importance, and if this agreement had in plain terms imposed

the penalty or damages now claimed as payable in any event, whether from accident or otherwise, I would, for one, have felt no inclination to escape from its infliction by my judgment on the ground of its unreasonableness.

But not only is the language upon which we are asked to reach this result ambiguous and unusually obscure, but in addition, the defendants' construction is entirely repugnant to the exception explicitly provided for, earlier in the clause, in the case of unforeseen accident.

The proper way to read the clause in question is, I think, to treat it as excluding for all purposes lights not lit as the result of unforeseen accident. These unlit lamps are, of course, not to be paid for as if lit, and, on the other hand, there should in such a case be no penalty imposed for failure to light.

This permits of the words "in any event" being applied, as I think they should be applied, to the lamps which the superintendent is to certify as not lit, under the terms of the agreement, which, as I have pointed out, seems to me not applicable to the case of lamps unlit as the result of unforeseen accident. In this connection I am inclined to think that these words "in any event" have relation to the nature of the penalty rather than to the event upon which the payment is to be based. The plaintiffs are to pay "in any event," that is, as fixed and liquidated damages, and not a penalty, the stipulated sum of fifty cents a lamp for a lamp not lit and kept lit according to the terms of the agreement. So applying them, these words aid in the conclusion contended for by the defendants, that this sum is liquidated and agreed upon, and not a penalty, and in my opinion such is the proper conclusion.

The learned Master dealt very fully with the question of the necessity for a certificate from the defendants' superintendent as a condition precedent to bringing this action, a matter not apparently referred to in the judgment of the Chancellor, although fully argued before us. I think the Master came to the correct conclusion as to this, and also to the cognate question of the necessity for a report from the fire and light committee, adopted by the council.

There is much to be said for the view that if, as the defendants contend, the superintendent is merely their servant or echo, a certificate from him, or, in other words, from the defendants, is not a condition precedent at all: *Dallman v. King*, 4 Bing. N. C. 105, 44 R. R. 661; *Stadhard v. Lee*, 1 B. & S. at p. 471.

In addition, there is now the circumstance that the construction insisted upon by the defendants of the agreement

between the parties was erroneous. The plaintiffs did not agree to submit questions of law to the final opinion of the defendants or their officers. It is quite apparent that the superintendent was not a free agent. He considered it to be his duty to adopt implicitly the city solicitor's opinion, which, as the superintendent himself says in his evidence, left him no choice. In this additional sense, the defendants did prevent the superintendent from certifying, if his certificate was a condition precedent.

There is nothing in the argument that the plaintiffs are seeking to recover as upon a quantum meruit. Their action is based distinctly upon the contract, and upon the contract as properly construed they are, I think, entitled to recover the amount which may be found to be owing to them.

The appeal, in my opinion, fails and should be dismissed with costs, and the matter remitted to the Master to continue the reference.

JUNE 29TH, 1903.

C. A.

ARMSTRONG v. LANCASHIRE INS. CO.

Fire Insurance—Cancellation of Policies—Proposal—Acceptance—Return of Premiums—Payment by Cheque—Deduction of Commission.

Appeal by plaintiffs from judgment of MEREDITH, J., dismissing action upon two policies of insurance against fire issued by defendants at Montreal, in favour of plaintiffs, insuring certain buildings at Montreal West, the first dated 18th July, 1900, for \$5,666.66, the second dated 27th September, 1900, for \$2,800, each for the term of one year.

The appeal was heard by MOSS, C.J.O., MACLENNAN, GARROW, MACLAREN, J.J.A.

A. B. Aylesworth, K.C., and W. Johnston, for appellants.

L. G. McCarthy, K.C., and C. S. MacInnes, for defendants.

GARROW, J.A.—The plaintiffs are land agents residing and carrying on business at Toronto. They effected these insurances through a Mr. Bamford, residing at Montreal, who was at one time an agent of defendants, but who at the dates of the policies in question had ceased to be such agent, and had in fact become an agent for another insurance company.

In the policies the property insured is described (1) two brick first-class roofed houses occupied as retail stores and (2) a three-storey brick first-class roofed building occupied as a retail store and dwelling only.

As a matter of fact, the stores were not occupied at the dates of the policies, but were all vacant, although an office storey in one was occupied as a dwelling, and two days before the second policy's date one of the stores became occupied also as a dwelling.

One of the rules of defendants was not to insure vacant house property, and plaintiffs, having had occasion to look over their policies, and finding this rule, wrote defendants on 4th January, 1901, at Montreal, informing them of the facts, to which defendants replied by letter, dated 5th January, 1901, that, "as we do not insure unoccupied property in the country, we must ask you to take these policies to our office in Toronto and have them cancelled, as we cannot maintain any longer on the risk. I have advised our office of what you will call, and on the return of the policies you will get a rebate, less the commission paid you"—referring to a commission of 15 per cent. which had been allowed to plaintiffs out of the premium under a former arrangement with defendants.

Both policies contained a condition in the following words: "If during this insurance the risk be increased by the destruction of buildings, or by the use or occupation of neighbouring premises or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the insured or his representatives, of their intention to do so, in which case the company shall refund a ratable proportion of the premiums." And defendants in proposing to cancel were proceeding under the power contained in this condition.

Upon receipt of this letter, plaintiffs sent their clerk to the office of defendants at Toronto, and after two or three days the transaction was completed. Plaintiffs signed instruments upon the policies declaring them cancelled. Plaintiffs' clerk took the policies so indorsed, cancelled, to defendants' office, and there in the afternoon of 10th January, 1901, received defendants' cheque for \$54.97, the amount of the rebate or unearned premium, less the 15 per cent. commission. Plaintiffs gave up the policies to defendants. This cheque on its face showed that the 15 per cent. commission had been deducted.

On the same day, but later in the afternoon, the insured premises were destroyed by fire, and plaintiffs were informed of the fire in the morning of the next day.

No objection to the cheque was made at the time, either as to amount or as to its nature as legal tender or payment. Plaintiffs on 16th January deposited the cheque in the bank, and received payment by having the amount placed to their credit.

This was the position until 23rd January, when plaintiffs wrote to defendants, and for the first time complained, and attempted to recall and undo what had taken place. They did not allege that they had acted under any misapprehension of fact, but simply that they had been advised that defendants had exceeded their powers in attempting to cancel the policies, and they returned by their own cheque the \$54.97 which they had received, and claimed to recover the loss. Defendants at once returned the cheque and repudiated the claim, and hence the action.

The Judge at the trial held that Bamford was the plaintiffs' agent, and that plaintiffs had agreed to the cancellation and accepted the cheque as payment, and that the policies were cancelled and at an end when the fire occurred.

I agree with his conclusions. . . .

It was urged before us that defendants had no power to cancel, or that they exceeded their power, that in any event they had no right to deduct the commission, and that the cheque was not payment.

Under certain circumstances, each of these would probably be formidable enough, but it seems to me that they are all overborne by the facts and the necessary conclusions from them. Defendants may not have had power under the condition to compel cancellation or to compel it in the manner proposed, but they were quite at liberty to propose cancellation. . . . It is clear that plaintiffs accepted the proposal and themselves voluntarily executed formal cancellations on the policies, and sent them by their clerk to the office of defendants, intending that they should be delivered up as cancelled upon payment of the rebate. They had been told in the letter from defendants that the commission would be deducted. Its deduction, therefore, was one of the terms of cancellation proposed, and, as I think, accepted by plaintiffs, and the cheque given to the clerk and retained by plaintiffs and afterwards used as their own, shewed on its face the deduction of the commission.

Payment by cheque is the usual mode of closing such transactions. No one expects to be paid in legal tender.

. . . Even when plaintiffs do complain it is not of payment of an insufficient amount, or by cheque instead of cash.

The case would have stood very differently, if, on the morning of the 11th January, plaintiffs had returned the

cheque. They could perhaps have then raised the question which they now seek to raise, or some of them, effected payment, but, retaining the cheque after the fire, and using it as cash, did, it seems to me very clear that they cannot now be allowed to say that the whole matter was not completely concluded and the risk at an end when the policies were delivered. I think, under the circumstances, it may be properly held that the plaintiffs accepted the cheque itself as payment. But, in any event, and apart from any special acceptance, the cheque was in law a conditional payment, the condition being that it was to be payment if funds were provided by the drawer to meet it. The cheque was duly paid, the condition was duly performed, and that, I think, is an end of the matter. See *Bidder v. Bridges*, 37 Ch. D. 406; *Carmarthen, etc., R. v. Manchester, etc., R. W. Co.*, L. R. 8 C. P. 685; *Hughes v. Canada Permanent L. and S. Society*, 39 U. C. R. 22.

The appeal fails and should be dismissed with costs.

MACLENNAN, J.A., gave reasons in writing for the above conclusion.

MOSS C.J.O., and MACLAREN, J.A., concurred.

JUNE 29TH,

C. A.

RE GRAND TRUNK R. W. CO. AND CITY OF TORONTO.

Assessment and Taxes—Exemption from Municipal Taxation—Way—Tracks along Street or Highway—Toronto Esplanade—Construction of Order in Council, Statutes, and Agreements.

An appeal by the company from the decision of a majority of County Court Judges affirming the assessment of a strip of land near the water front of the city of Toronto, 40 feet wide, extending from Jarvis street to York street, and forming part of the roadway of the company. The land was assessed at \$15,000 per acre. The assessment was of a strip 5 feet in width. The County Court Judges allowed an appeal to the Court of Revision as to a strip 12½ feet wide by the length of the north side of the parcel, but confirmed the assessment of the remainder.

The County Court Judges were of opinion that the strip 12½ feet in width of the parcel was part of the street or highway forming the Esplanade street, and that the company were exempt from municipal taxation in respect thereof by sec. 11 of the Municipal Revenue Act of 1899, 62 Vict. ch. 8, which

that "railways shall not be liable to municipal assessment or taxation of the tracks and roadways upon or along any street or highway." They were further of opinion that the remaining 40 feet, not being a street or highway, was liable to assessment.

W. Cassels, K.C., for the appellants, contended that both parts of the land were equally parts of a street or highway, and equally entitled to exemption.

J. S. Fullerton, K.C., and W. C. Chisholm, for the city corporation, contended that there was a distinction between the two parcels, inasmuch as the north 60 feet of the original esplanade was and had been for a long time known as Esplanade street, while the remaining 40 feet, the subject of the appeal, was still merely part of the esplanade, with the title in fee simple vested in the city, and whereof the railway company were occupants within the meaning of the Assessment Act.

The judgment of the Court (OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

MACLENNAN, J.A.—. . . The first instrument relating to the subject is the Order in Council of 17th August, 1837, which authorized the grant by the Crown to the city of nearly all the then ungranted land and land covered by water on the water front of the city, extending from the Don to Simcoe street. . . . In pursuance of this Order in Council a patent was issued to the city on the 21st February, 1840, expressed to be upon the trust for the fulfilment of the terms and conditions expressed therein, including the condition of filling the several lots up to the south side of the esplanade in the plan annexed, and the condition that the esplanade should be made and constructed of not less than 100 feet in width in all the lots at the place designated in the plan.

The patent does not call the esplanade a street, as is done in the Order in Council, but . . . the two instruments must be read together, with the result that the esplanade provided for was intended to be a public street or highway.

In the year 1853 . . . an Act was passed, 16 Vict. ch. 219, reciting the Order in Council of 1837 and the patent of 1840 . . . and giving the city authority to enter into contracts for its construction, subject to the right of owners and lessees within a limited time to construct that portion thereof fronting upon and crossing their respective lots. By sec. 12 it was declared that no railway company should carry their railway along, upon, or across the esplanade without

the consent of the Governor in Council nor without continuation to the city.

[Reference also to 18 Vict. ch. 185; agreement between the city and the company of 30th August, 1856; 20 Vict. ch. 80; agreement between the city and the Great Western and Northern Railway Companies of 23rd December, 1857; agreement between the city and the three railway companies of 22nd December, 1864; 28 Vict. ch. 34.]

I do not find anything else in the agreements and orders relating to the esplanade which has any bearing on the subject of this appeal, and I think it clear that, the original intention of the Crown, and of the city, manifested by the Order in Council of 1837, having been that the esplanade was to be a public street or highway, that intention has not been departed from. But for the concession to the company of the right of way over the south 40 feet, there could be no doubt that the esplanade was to all intents and purposes a highway, and I do not find that the right so conferred was ever changed its character. It remains a highway, subject to the right, and the city and the Legislature have been very careful to preserve unimpaired, save by the limited rights conferred upon the railway company, the right of all his Majesty's subjects to pass over every part of it, at all times for all lawful purposes.

No doubt, the learned County Court Judges allowed the appeal as to the southerly 12 feet, 6 inches, by reason of the express declaration of sec. 2 of 28 Vict. ch. 34, that the esplanade street was to be deemed a public highway, and was exempt by sec. 11 of the Provincial Revenue Act. I think that declaration was unnecessary, and that the esplanade for its full width of 100 feet, was intended from the beginning to be, and has ever since its construction been, what was so intended, namely, a street or highway; and that the 12 feet in question is exempt equally with the 12 feet, 6 inches.

I am of opinion that the appeal should be allowed.

JUNE 29TH.

C. A.

RE NORTH GREY PROVINCIAL ELECTION BOYD v. McKAY.

Parliamentary Elections—Controverted Election Petition—Neglect to Leave Copy with Local Registrar—Necessity for Leaving Copy with Local Registrar—Rules—Dismissal of Petition—Extension of Time—Costs.

Appeal by the petitioner from two orders of MACLEOD J.A., in Chambers, ante 231, the first of which directed

the petition filed in the office of the local registrar at Owen Sound be dismissed and all further proceedings stayed, and the other of which dismissed an application by petitioner to extend the time for leaving a copy of the petition with the local registrar at Owen Sound, to be sent to the returning officer.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., and STREET, J.

I. F. Hellmuth, K.C., for petitioner, appellant.

R. A. Grant; for respondent.

MOSS, C.J.O.—The first question to be determined is, whether, by the terms of the Controverted Elections Act, as amended by 62 Vict. (2) ch. 6, or of the general Rules respecting the trial of election petitions, or by the conjoint effect of the Act and Rules, the petitioner was bound, when delivering the petition to the local registrar, to leave with him a copy thereof to be sent to the returning officer, in order that the latter might forthwith publish a notice thereof, pursuant to sec. 2 of the Act. . . .

Before the amendments introduced by 62 Vict. (2) ch. 6, the procedure was clearly defined. Section 12 of the Act was and is silent as to the person upon whom lay the duty of furnishing a copy to be sent to the returning officer. But Rule 2 made it the duty of the petitioner. . . .

The Act was amended by 62 Vict. (2) ch. 6, and it was enacted that, in cases arising elsewhere than in the county of York or city of Toronto, presentation of the petition shall be made by delivering it to the local registrar of the High Court of the county in which the electoral district or any part of it is situated, or otherwise dealing with the same in the manner prescribed. Following this it was provided that, on presentation of the petition, the registrar of the Court of Appeal or the local registrar of the High Court, as the case may be, shall send a copy thereof by mail to the returning officer of the electoral district to which the petition relates, thus making it the duty of the local registrar to send a copy to the returning officer for publication of a notice thereof.

Owing to some questions having arisen in consequence of there being no local registrars in some counties, and of there being no express provision for the case of an electoral district situate or partly situate in a provisional judicial district, Rules were passed to meet these cases, but Rule 2 was not amended.

The Act and the Rules must be read together as part of one code. Rule 2 was, of course, framed with reference to

Rule 1, which provides that presentation of an election petition shall be made by leaving it at the office of the registrar of the Court of Appeal; and so Rule 2 properly provided that the copy should be left with the said registrar.

The effect of 62 Vict. (2) ch. 6, however, is to modify Rule 1, which must now be read as containing directions for leaving the petition at the office of the registrar of the Court of Appeal or of the local registrar of the High Court, as the case may be. The Court of Appeal being the only Court dealing with election petitions, and all petitions being required to be introduced in that Court, they must be taken to be received for it by the local registrars, who are constituted registrars of the Court for the purpose. Thus Rule 2 applies to make it the duty of the petitioner to leave with the petition a copy thereof for the registrar to whom or at whose office the petition is to be delivered, to send to the returning officer.

I agree, therefore, that the petitioner was in default of not complying with the requirements of the Rule in this behalf.

But the duty is imposed by Rule, and not by statute, and the provision as to the time when it is to be performed is subject to Rule 58, enabling the Court or a Judge in a proper case to increase, enlarge, or abridge the time appointed by the Rules for doing any act or taking any proceeding. It can make no difference that the Rule says that the copy shall be left at the same time as the petition, instead of sending it, as it might, that it shall be left within 48 hours or a week after the delivery of the petition. In either case there is a time appointed for doing an act or taking a proceeding.

The power given by Rule 58 is wider than that under the English Rules, which were the guide in the *Lisgar Election Case*, 20 S. C. R. 1, and the *Burrard Election Case*, 31 S. C. R. 549. Section 64 of the Dominion Controverted Elections Act, to which reference was made in the latter case, is more restricted in its terms than Rule 58. It does not extend to enabling an enlargement of time although the application is not made until after the expiration of the time appointed. This Rule appears to me to furnish a satisfactory answer to the argument that the leaving of the copy of the petition is part of the presentation of the petition, without which it is not complete. That argument proceeds upon the proposition that the two things are directed to be done and must be done together. But, though *directed* to be done together, they are not necessarily and in every case to be done together, because the Court or a Judge may increase or enlarge the time for the doing of the second act.

The next question is, whether in this case the time should have been . . . enlarged upon the application of the petitioner.

Neither the Act nor the Rules specify any time or number of days within which the copy of the petition is to be sent to the returning officer. By Rule 9 the registrar is required to send it forthwith upon the presentation of the petition and the notice of deposit of money, that is, within a reasonable time afterwards. There is thus less difficulty, in the absence of proof of substantial prejudice, in relieving against what is shewn to have arisen from a misunderstanding of the practice, or a misconception of the requirements of the Act and Rules, and not from intentional disregard of well understood procedure.

The question of what was necessary to be done is not at all free from difficulty. Even if the solicitor had had the Rules before him, he might have fallen into the same error, and, although he could in a case of such doubt have adopted the safe course, and would have acted more prudently if he had, yet his failure to do so was in good faith, and he ought not to be held strictly to the consequences of his mistake: *McFeeters v. Dixon*, 3 Ch. Ch. 84, 88.

I think, therefore, that the time should have been enlarged on proper terms. I would allow the appeal, but, inasmuch as the petitioner was at fault in the first instance, and as the points involved are new to some extent, the costs of the two motions should be costs in the petition to the respondent in any event, and the costs of the appeal should be costs in the petition. The order of dismissal of the petition should be discharged.

OSLER, J.A., gave reasons in writing for the opinion that this was, at the least, a case for relieving the petitioner under the provisions of Rule 58, and was content with the order proposed by the Chief Justice.

GARROW and MACLAREN, J.J.A., also concurred.

STREET, J., gave reasons in writing for the view that it was not necessary for the petitioner to leave a copy of the petition with the local registrar; but stated that if this view was incorrect, he agreed in the reasons given by the Chief Justice for allowing the petitioner to make good his omission.

CARTWRIGHT, MASTER.

JUNE 30TH.

CHAMBERS.

TOWN OF OAKVILLE v. ANDREW.

Venue—Change of—Rule 529 (b)—Naming Improper Venue in Summons—Motion by Defendant to Change—Estoppel by Consent—Cause of Action—Preponderance of Conveniences—Books of Bank—Extra Expense—Fair Trial—Motion.

Motion by defendant to change venue from Toronto to Milton, pursuant to Rule 529 (b).

W. N. Ferguson, for motion.

D. O. Cameron, for plaintiffs, opposed the motion, on the following grounds: (1) that defendant's solicitor had agreed to have the trial at Toronto as the place of trial; (2) that the cause of action arose in Toronto; (3) that there was great preponderance of convenience against Milton, sufficient to satisfy the test imposed in *Pollard v. Wright*, 16 P. R. 507.

THE MASTER.—The first ground is displaced by plaintiff having named Toronto in the writ of summons itself as the place of trial. This writ was issued on 4th December, 1917, long prior to the interview with defendant's solicitor, which Mr. Cameron relies. Having thus named the place of trial, plaintiff could not have changed it without an order. See *Segsworth v. McKinnon*, 19 P. R. 178. Apart from this, however, I do not think that a casual question, under the circumstances of the alleged consent in this case, could have the effect of a consent order, as argued by Mr. Cameron.

As to the second ground, I cannot agree with the contention of plaintiffs' counsel. In my view, the cause of action arose in the county of Halton. It was there that the contract was made between plaintiffs and defendant, as is set out in the statement of claim, paragraphs 3 and 4. It could not be successfully contended that the alleged wrongful death of the deceased treasurer at Toronto was the cause of the action any more than the refusal by defendant of payment in paragraph 11, and which was presumably in the county of Halton.

There remains the third ground, of preponderance of convenience, under which head may be also considered the alleged difficulty of having any other result than a decision at a trial by a jury in the county of Halton, as set out fully in Mr. Cameron's affidavit.

To meet any question of extra costs, Mr. Cameron has assented to the usual provision that these shall be borne by plaintiffs in any event, as a term of the dismissal of the motion, or he will agree to the allowance of the motion if defendant will waive his jury notice. Defendant is not willing to give any consent to either of these propositions.

The case must be dealt with as if the venue had been fixed at Milton under Rule 529 (b) and plaintiffs were asking to have it changed under cl. (d). The question, therefore, whether they have made out "the very strong case" said in *Pollard v. Wright* to be necessary. The onus is clearly on plaintiffs, and I cannot say that they have satisfied it. The County of Halton has a population of nearly 20,000. Of these at least some hundreds must be qualified as jurors, and it can scarcely be presumed that twelve men cannot be found who will pay attention to their oaths to give a true verdict according to the evidence.

In any case plaintiffs can move before the trial Judge to dispense with the jury, and in a proper case this will doubtless be done.

As to the necessity of examination of the bank's books and officers and any inconvenience resulting to them from being required to attend at Milton, I would refer to *Standard Main Pipe Co. v. Town of Fort William*, 16 P. R. 404. . . .

The venue must be changed from Toronto to Milton. It costs to defendant in any event, because the naming of Toronto as the place of trial in the writ of summons was a violation of Rule 529 (b), which was not in any way caused by anything said by defendant's solicitor.

MACMAHON, J.

JUNE 30TH, 1903.

CHAMBERS.

RE WARBRICK AND RUTHERFORD.

Landlord and Tenant—Overholding Tenants Act—Proceedings under—Motion for Prohibition or Certiorari—No Writ of Possession Issued.

Motion by H. A. Rutherford for an order requiring the Judge of the County Court of Peel to send up the papers in certain proceeding before him under the Overholding Tenants Act begun by J. F. Warbrick, as landlord, against the applicant, as tenant, and also for an order for prohibition to the Judge, Warbrick, and the sheriff of the county of Peel, to prohibit them from taking any further proceedings under the order of the Judge of 23rd July, 1902, directing a writ

of possession to issue to place Warbrick in possession of the premises leased to Rutherford.

Gideon Grant, for the applicant.

J. G. O'Donoghue, for the landlord.

MACMAHON, J.—No writ of possession has as yet been issued, and under sec. 6 of the Act, it is only where such a writ has been issued, that such a motion as the present can be made.

The motion must be refused with costs.

MACMAHON, J.

JUNE 30TH, 1901.

CHAMBERS.

BONTER v. NESBITT.

Solicitor—Lien for Costs—Depriving Solicitor of—Settlement of Costs—Collusion to Prevent Acquisition of Lien—Right of Plaintiff to Costs—Promise of Defendant to Pay—Leave to Continue Action for Recovery of Costs.

Appeal by plaintiff and his solicitor from order of the local Judges at Cobourg dismissing appellants' motion for an order upon defendant to pay the costs incurred by plaintiff in this action; upon the ground of a settlement of the action between plaintiff and defendant, behind the back of plaintiff's solicitor, which deprived the latter of his costs.

R. C. Clute, K.C., for appellants.

C. H. Ritchie, K.C., for defendant.

MACMAHON, J.—The record had been entered for trial at the non-jury sittings at Cobourg commencing on Monday the 20th April. The Court adjourned at ten o'clock at night it being arranged that the trial of this action, which was a malicious arrest and prosecution, should be proceeded with at the opening of the Court on the following morning.

Shortly after the adjournment of the Court, the plaintiff and the defendant—who both live in the village of Bridgton—met at a hotel in Cobourg and went into a room together where they discussed the question of settlement until about one o'clock of the following morning, when it was agreed that the action should be dismissed, and the defendant should pay the plaintiff \$400, and discharge him from all claims arising out of the counterclaim against the plaintiff. Mr. North, the defendant's counsel, and Mr. Drewry, his solicitor, were consulted; the former prepared a memorandum of settlement, s

the cause, by which it was agreed "that the plaintiff's claim and defendant's counterclaim should each be dismissed without costs, and the Court is requested to enter judgment accordingly." This memorandum was signed by the plaintiff and the defendant.

The plaintiff in his affidavit states that, during the discussion as to the settlement, he proposed to the defendant that Mr. Clute, his counsel, who was staying in the hotel, should be called in to assist and advise in the settlement; but the defendant refused, and said if Mr. Clute were called he would not settle at all. But, after the terms of settlement had been agreed upon, the defendant called in Mr. Northrup, K.C., his counsel, and Mr. Drewry, his solicitor, and after they left the room, the defendant paid plaintiff \$10 in cash and gave him a cheque for \$355 on the Standard Bank at Brighton, the extra \$5 being to cover his expenses, under an arrangement between them by which the plaintiff was to take the early train for Toronto the same morning, so that when the Court should open he should not be present, and his counsel and solicitor should not know of his whereabouts. Plaintiff and defendant sat up together until three o'clock in the morning, when plaintiff went to the Cobourg station, and took the 4.20 train for Toronto, according to the arrangement, and plaintiff left Toronto by the train at 5 o'clock in the afternoon and returned to Brighton. The plaintiff also states that, as part of the settlement, the defendant agreed to assist him in settling his costs, which included the costs of defence in a criminal proceeding brought and instigated by the defendant against him in respect of which the plaintiff's action was brought, and the costs of the action, and when plaintiff met the defendant at Brighton on the 22nd he spoke to him about the costs, and defendant urged him to pay no attention to the bill of costs. Plaintiff would not agree to this, and defendant then told him to get the bill and bring it to him and he would help him to settle. On the 22nd he got the bill of costs from his solicitor, and took it to the defendant, who examined it and said, "I won't pay it, let them sweat a while."

The defendant denies that there was any arrangement between himself and plaintiff that plaintiff should leave Cobourg and go to Toronto, and says that he did not pay plaintiff anything for his expenses to Toronto, but that the arrangement was, that, as the case was settled, neither of them should require to appear in Court when the case was called, and Mr. Northrup should present the memorandum of settlement to the Court and ask to have the case marked settled.

and struck off the list; that he did not agree to pay plaintiff's costs or to assist him in settling the bill of costs; also states that he did not refuse to permit Mr. Clute to be called in on behalf of the plaintiff, but said if Mr. Clute called that Mr. Northrup and Mr. Drewry should be called in, and that they had better settle it themselves out any lawyers.

When Mr. Northrup and Mr. Drewry were called in to write the memorandum of settlement, neither of them was told of the terms of settlement, except those disclosed in the memorandum itself. Mutual releases under seal were prepared by Mr. Northrup and executed by the plaintiff and defendant, which on the plaintiff's part included the release of the defendant from the claims for which he was sued for in the action. No money consideration is mentioned. And the defendant's solicitor, Mr. Drewry, stated in his affidavit that it was not until the 5th May 1901 that he learned from his client that any money had been paid by cheque given by him to the plaintiff.

Shortly before the Court opened on the 22nd, Mr. Northrup informed Mr. Clute that the case had been settled. When the case was called Mr. Northrup informed the Court that a settlement had been arrived at, and read the memorandum of settlement and offered to put it in. Mr. Clute urged that the case should go on, and that Mr. Northrup could amend the pleadings by adding as an additional defence the settlement. After argument the trial Judge ordered that he would strike the case off the list, reserving to the plaintiff the right to move to have the case reinstated on giving notice.

The defendant states in his affidavit: "I assumed that the plaintiff owed anything to his solicitor or counsel for costs, he would pay them out of the money and cheque he gave him." The affidavit is silent as to how the sum of £5—the consideration paid the plaintiff to settle—was paid, or what the \$5 was paid for, although plaintiff states expressly that it was given to pay his expenses to Toronto. The defendant admits that he saw plaintiff in Brighton on the 22nd, "who said something about Gordon (plaintiff's solicitor) and arranging his costs, and I told him he had better get a bill of them and get them settled up," and that on the 23rd he saw plaintiff, who shewed him a bill of costs, which he had received from his solicitor, and he told plaintiff it seemed a very large bill, and if he were in his (plaintiff's) place he would have it taxed.

The learned local Judge, in his written judgment dismissing the plaintiff's motion, said: "The collusion that r

is a conspiracy between the parties to cheat the solicitor of his costs." In this the learned Judge was in error, in order to establish collusion it is not necessary to shew they were acting fraudulently, or had entered into a conspiracy to cheat the solicitor. Mr. Justice Denman in *Ex parte Crouch*, 60 L. J. Q. B. at p. 768, in referring to a comment of Lord Campbell's in his judgment in *Brunsdon v. Lard*, 1 E. & E. 19, that where there is a compromise between the parties "the result of which is that the attorney releases his lien, provided that the arrangement is not a mere collusion between the parties to deprive the attorney of his costs," said: "I do not think, however, that Lord Campbell meant to say that unless there was a 'mere juggle,' a juggle in a fraudulent sense, there could be no collusion. The other cases do not go so far. Mr. Justice Wightman hits the mark; 'Was the object of the arrangement to deprive the plaintiff's attorney of his costs.'"

Although collusion must be clearly established, it may be inferred from the mere facts, or made out on the respondent's own evidence: *Cordery's Law of Solicitors*, 3rd ed., p. 10.

Then, is the proper inference to be drawn from what is disclosed by the affidavits and the conduct of the parties, that the object of the arrangement was to deprive the plain-solicitor of his costs? . . .

See the remarks of Kekewich, J., in *Margetoon v. Jones*, [1897] 2 Ch. at p. 318. The absolute silence of both the plaintiff and defendant as to the money payments shews there was an understanding between them that no disclosure should be made regarding the amount the plaintiff was to receive in the litigation. The conduct of the parties is important. The plaintiff and defendant are together until three o'clock in the morning, when the plaintiff leaves for the station to board a train for Toronto, in order, as he says, that he may not meet his solicitor; and the payment of the extra costs for which the defendant in no way accounts—would indicate that the plaintiff received it for the purpose stated in his affidavit.

If the costs due by the plaintiff to his solicitor were not passed on the night of the 21st, and if defendant made no enquiry about settling them, what was the plaintiff's object in speaking to him, and what interest had the defendant in the matter calling for his advice to the plaintiff to get the bill, and after the bill was procured and brought to him, on the 23rd, if the defendant were not interested in the question of the costs, why was he tendering advice to the plaintiff to have it taxed?

All this, however, while it shews there was collusion to prevent the plaintiff's solicitor acquiring a lien for his costs on the amount agreed to be paid to the plaintiff, does not shew collusion between the plaintiff and defendant to totally deprive the solicitor of his costs, because the plaintiff states that the promise of the defendant to pay the costs is part of the agreement under which the settlement was effected. If that is so, then the plaintiff is entitled to his costs of costs notwithstanding the release, otherwise it would be a fraud on the plaintiff to agree to pay, and on the defendant to secure the execution of a release, and when the costs of costs is furnished to set up the release. According to the plaintiff, both he and the defendant were by this agreement providing for the payment of the plaintiff's costs, and if that was his understanding, there was no collusion to deprive his solicitor of his costs.

Both the plaintiff and his solicitor are applicants for an order, although the motion does not ask for an order in the affirmative allowing the plaintiff to continue the action for recovery of the costs, there is power to make such an order. *Price v. Crouch*, 60 L. J. Q. B. 767; *Dunthorne v. Burrows*, 24 L. R. Ir. 6.

The substantial material upon which such an order is to be made is abundant, and it should be made now without driving the parties to the expense of making a subsequent motion. The order of the learned local Judge will therefore be varied by permitting the plaintiff to re-enter the cause for trial for the next jury sitting at Cobourg, without paying any fee for such re-entry, and also by making the costs of that motion in the cause to the successful party. The result of the appeal will be in the same way.

MACMAHON, J.

JUNE 30TH,

CHAMBERS.

MARSH v. MCKAY.

Security for Costs — Defamation — Unmarried Woman — Trivial and Frivolous Action—Defence on Merits.

Appeal by defendant from order of Master in Chambers ante 522, dismissing application by defendant for costs of an action for libel brought by an unmarried woman against the publisher of a newspaper.

S. B. Woods, for defendant.

T. H. Lloyd, Newmarket, for plaintiff.

MACMAHON, J.—The article complained of appeared in the "Express-Herald" in its issue of the 13th February, 1903, sent by its correspondent from Roach's Point, and consists of two separate paragraphs, as follows:

"We beg to offer an apology to the 'Era' correspondent for the error of last week, concerning Miss Emma Young, and at the same time to inform the 'Era' scribe that we often make mistakes and are not ashamed to acknowledge them. But the 'Era' correspondent was never known to make any mistakes in life, not even five years ago.

"Captain McKay is again at the Point, drawing the timber for Calder Boyd's barn. Wonder if he is renewing old acquaintances."

The 'Era' newspaper is also published in Newmarket.

The above paragraphs are inserted in the statement of claim, and the innuendo is that the defendant was thereby imputing or meaning that the plaintiff and said Captain McKay were committing fornication."

The plaintiff, who lives in the township of North Gwillimbury, made an affidavit in which she states that in March, 1898, she became the mother of an illegitimate child, of which Captain McKay was the father, which was well known in North Gwillimbury, and that the article in question she has every reason to believe refers to her and that it imputes that she has been renewing improper relations with Captain McKay, and that since the birth of said child she has had no relations whatever with Captain McKay.

The plaintiff does not state in her affidavit that she is the correspondent of the "Era," and no such allegation is made in the statement of claim.

In the defendant's affidavit he swears he has a good defence to the action on the merits; that the words complained of were published in good faith and without malice and without intent to convey the meaning attributed to them by the plaintiff's statement of claim, or to insinuate that the plaintiff was guilty of fornication; that he was not at the time of the alleged publication aware that the plaintiff was then or ever had been the correspondent of the "Era;" and that the items have no connection with each other.

If the plaintiff is the correspondent of the "Era," the first paragraph would doubtless refer to her. The announcement that "Captain McKay is again at the Point, drawing timber for Calder Boyd's barn," is a legitimate item of news.

During the argument, counsel for the plaintiff admitted that if the paragraph relating to Captain McKay had ended with the positive assertion that "he is renewing old acquaintances" (which, according to the plaintiff's affidavit, would

have included her—she being an old acquaintance) he could not have contended that the effect of the paragraphs is to impute that the plaintiff and Captain McKay were committing fornication. But, because the correspondent of the "Express-Herald" put it in the shape of an interrogator and "wondered if he (Captain McKay) was renewing old acquaintances," he urged that the sting was in the word "wonder," and a different interpretation must be put upon the paragraphs from that which they would have borne had the positive statement been made that Captain McKay was renewing old acquaintanceship.

As it had to be admitted that any innuendo that might be framed could not alter or extend the sense of the words, as a positive statement had been made that Captain McKay was renewing old acquaintanceships, so as to make them mean that the plaintiff and Captain McKay were guilty of immoral conduct, it is clear, I think, that no innuendo could alter or extend the sense of the words in the paragraphs as they stand, so as to give them the meaning contended for, which is, that they impute that the plaintiff and Captain McKay were committing fornication.

Mr. Odgers, in his work on Slander and Libel, 3rd ed. at p. 90, says, in reference to the Act which permits an action to be brought for words spoken and published which impute unchastity or adultery to any woman or girl, "that the Act does not apply to any case in which gross epithets are used merely as general terms of abuse; the words must be such as to convey to the hearers a definite imputation that the plaintiff has in fact been guilty of adultery or unchastity."

So also in an action for libel in which it is charged that the writing imputes unchastity to a woman or girl, the language must be such as to convey to the readers a definite imputation that the plaintiff has been guilty of unchastity.

The grounds of action are, in my opinion, frivolous, and the order appealed against must be set aside and the plaintiff ordered to give security for the costs of the action.

The costs below and of this motion to be costs in the cause to the defendant.

FERGUSON, J.

JUNE 30TH, 1900

CHAMBERS.

RE GLANVILLE v. DOYLE FISH CO.

Prohibition — Division Court — Territorial Jurisdiction — Cause of Action, where Arising—Contract by Telegraph.

Motion by defendants for prohibition to the 3rd Division Court in the district of Algoma. Action to recover the price

a quantity of fish sold by plaintiffs to defendants, the latter residing and carrying on business in the city of Toronto. The plaintiffs resided and carried on business at Thessalon, in the division of the Court in which the action was brought. On the 14th December, 1902, plaintiffs telegraphed from Thessalon to defendants at Toronto: "Offering fresh caught whitefish frozen five half cents f.o.b. here, if want how ship." Next day defendants telegraphed to plaintiffs from Toronto: "Freight ten hundred pounds white, some trout if you have them." The fish were shipped by plaintiffs immediately upon the receipt of this message.

Gideon Grant, for defendants.

Grayson Smith, for plaintiffs.

FERGUSON, J., held that plaintiffs' telegram was part of the contract, and that the contract was not wholly made at Thessalon, but partly in Toronto. Thus the cause of action, which consists of the contract and the breach, did not arise at Thessalon, and the Court there had no jurisdiction. The defendants had not by their conduct waived their right to prohibition.

Order made for prohibition with costs.

MACMAHON, J.

JUNE 30TH, 1903.

WEEKLY COURT.

KOPMAN v. SIMONSKY.

Purchase—Change of Site—Resolution of Congregation—Meeting—Notice—Irregularity—Trustees—Injunction.

Motion by plaintiff for an interim injunction to restrain defendants from applying a sum of \$1,000 in their hands as trustees upon the purchase of a new site in University street, Toronto, for a Jewish synagogue, for a congregation worshipping in a synagogue at the corner of Elm street and University street, and to restrain defendants from purchasing the same, on the ground that the congregation had not proceeded regularly to authorize the purchase.

L. F. Heyd, K.C., for plaintiff.

J. Baird, for defendants.

MACMAHON, J.—The meeting of the Jewish congregation known as the "Goel Tsedec" called for the purpose of considering the advisability of purchasing a new site for a synagogue, was not called on the day provided by the rules of the synagogue, nor was the requisite notice of four days given

to the members of the congregation. The by-laws and provide that all meetings shall be held on the first Sunday of the month, and the regular meeting would have been Sunday the 6th June, but a special meeting for considering the purchase of a new site was called for Sunday the 1st May, and the notices calling the meeting were not posted till the 27th May. It was stated that many members of the congregation are pedlars and frequently absent from the church and in consequence the attendance at the meeting was small, only 34 out of a membership of 130 being present when the resolution was put and carried authorizing the purchase of certain property in University street for \$4,600. A considerable number of the members of the congregation are opposed to the site chosen, and also to the sale of the site on which their present place of worship stands.

The notice for the special meeting was inadequate, having regard to the importance of the subject to be considered. The defendants, who, as trustees, hold the moneys of the congregation on deposit, must be restrained from withdrawing the same from the Imperial Bank, until after the trial, until in the meantime a regular meeting of the congregation is held for the purpose of considering the question, when, if a majority resolve on the purchase of a new site, defendants or any other member or members of the congregation may move to dissolve the injunction.

Order accordingly. Costs in the cause unless otherwise ordered by the trial Judge.

BRITTON, J.

JULY 2ND, 1891

WEEKLY COURT.

RE SOLICITOR.

Costs—Assignment of Portion of Fund in Question in Action by Client to Solicitor—Decease of Client—Validity of Equitable Assignment—Corroboration.

Appeal by solicitor from decision of local Master at Ottawa upon taxation of costs of solicitor and accounting against the estate of J. W. McCrae, deceased

The Solicitor, in person.

J. F. Smellie, Ottawa, for estate of J. W. McCrae.

BRITTON, J.—The evidence of the solicitor, corroborated as it is, establishes a good equitable assignment by the deceased of so much of an existing fund as would pay the costs due to the solicitor; and the fact that bills of costs had not been rendered was not material. The deceased knew that

substantial sum was owing; the costs had been incurred; and there was the liability for these costs—amount subject to taxation. *Hughes v. Chambers*, 22 C. L. T. Occ. N. 333, 14 Man. L. R. 163, and *Palmer v. Culverwell*, 85 L. T. N. S. 58, 759, referred to. If the fact of the assignment is established it makes no difference that the agent collecting the debt is himself a creditor to whom the equitable assignment was made. As to corroboration, see *Re Curry*, 32 O. R. 150, 23 A. R. 676. Appeal allowed without costs. Order made for payment over of balance. Costs of Ottawa Trust and Deposit Co., as between solicitor and client, to be paid out of his money.

MACMAHON, J.

JULY 4TH, 1903.

CHAMBERS.

BERRIDGE v. HAWES.

Action—Summary Dismissal—No Reasonable Cause of Action Alleged—Claim for Wrongful Dismissal—Claim to Enforce Mechanic's Lien—Company—Agreement with.

Motion by defendant to strike out the writ of summons and statement of claim, and to set aside the service thereof, on the ground that they disclose no reasonable cause of action, and because the claim indorsed on the writ of summons cannot be joined with a claim for enforcement of a mechanic's lien. The claim indorsed on the writ was for damages for wrongful dismissal from defendant's employment as building superintendent and foreman, and for breach of contract. The statement of claim set forth an agreement for (amongst other things) the formation of a company for the erection of apartment houses in the city of Toronto, services performed under the agreement, and as building superintendent, the registration of a mechanic's lien, and concluded by claiming payment of \$3,200, a declaration of lien, and \$2,000 damages for breach of contract and wrongful dismissal.

W. H. Blake, K.C., for defendant.

W. E. Raney, for plaintiff.

MACMAHON, J.—. . . It appeared that building operations were commenced and carried on from March until May, when they were interrupted by a strike of the workmen, at which time \$30,000 had been expended on the building. Plaintiff was paid \$15 as superintendent during each week the building operations were in progress. In addition,

he was entitled, forthwith after the incorporation of the company mentioned in the agreement, on payment by him to the treasury of the company, to have allotted to him common stock of the company to the amount of \$1,500, and as the expenditure on the buildings increased and reached \$100,000, he would have been entitled to receive stock to the par value of \$5,500, on payment of ten per cent. into the treasury. . . . As the additional remuneration plaintiff was to receive was in the stock of the company, unless and until he tendered the ten per cent. (\$150) on the par value of the stock, he was not entitled to have it allotted to him. He tendered the \$150, and the company refused to allot it. He could have sued for specific performance or have recovered damages for the non-delivery. If he had paid the \$150, the stock had been issued to him, it might not for some years be worth even the \$150. He could not claim specific performance from defendant of the agreement to allot the stock, or sue him for breach of the contract to deliver the stock, for the contract is with the trustees until the incorporation, when it is with the company. On the present motion the conduct of plaintiff must alone be looked at. Plaintiff sets out the agreement between himself and the trustees of the company about to be incorporated, whose service he entered as superintendent, and who agreed to pay him a weekly wage for his services, and, as an additional remuneration, to allot to him certain stock. That constitutes no reasonable cause of action against defendant, with whom he could not pretend to have any contract after the agreement was executed. His action is unsustainable. Order made setting aside statement of claim and vacating registration of lien, with costs. *Kellaway v. Bury*, 8 Times L. R. 433; *Willis v. Earl B. de B. Champ*, 59 L. T. N. S.; *Salomons v. Knight*, 8 Times L. R. 472; *Hubbuck v. Wilkinson*, [1898] 1 Q. B. 86.

MACMAHON, J.

JULY 4TH, 1898.

WEEKLY COURT.

REX v. DUNGEY.

Justice of the Peace—Quashing Conviction—Costs.

Motion by defendant to quash conviction with costs against convicting magistrates. A Divisional Court (2 O. L. R. 2) allowed an appeal from an order of Robertson, J., refusing a certiorari. The prosecutor and magistrate assented to

shing of the conviction, but opposed the motion as regards s.

W. M. Douglas, K.C., for defendant.

J. H. Moss, for magistrates and prosecutor.

MACMAHON, J.—It is not a case for ordering the magistrates to pay the costs; under a mistake as to the law they considered that they had jurisdiction. *Regina v. Chapman*, 9. R. 582, distinguished. Order made quashing the conviction. Costs to be paid by prosecutor. No costs against magistrates.

BRITTON, J.

JULY 4TH, 1903.

TRIAL.

BRITTON v. INSURANCE CO. OF NORTH AMERICA.

Insurance—Apportionment of Loss—Existence of Concurrent Policy—Difference in Parties Insuring and Properties Insured.

Action upon policy for loss by fire on the 25th January, 1902, of furniture in the Hotel Cecil at Ottawa.

J. Lorn McDougall, Ottawa, and E. J. Daly, Ottawa, for plaintiff.

G. F. Shepley, K.C., and A. T. Kirkpatrick, for defendants.

BRITTON, J.—By the terms of the policy further concurrent insurance was permitted without notice. The defendants invoked condition 9 of the statutory conditions: "In the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." Defendants' policy was for \$3,500. They alleged that at the time of the fire there was concurrent insurance upon the same property, \$5,100 in the Phoenix, and \$3,500 in the Union. The plaintiff's total loss was \$9,033.43. Defendants paid to Court \$2,615.87, exclusive of interest. The plaintiff was the owner of the hotel premises and of a large quantity of the furniture therein. The hotel was leased to C. H. Genslenger, who was the licensee and hotel keeper, and the owner of other furniture which he brought into the hotel. There was no joint ownership. Plaintiff had insurance on his own furniture to the amount of \$6,000, \$2,500 in the Union and \$3,500

in defendant company. He said his loss upon the property so insured was \$7,264.74. Genslenger had at one time insurance upon his property in the hotel to the amount of \$6,100, viz., \$5,100 in the Phoenix and \$1,000 in the Union. In December, 1901, Genslenger made an assignment for the benefit of his creditors, and plaintiff bought Genslenger's furniture in the hotel from the assignee. After the assignment, and before the policy for \$5,100 expired, the agent of the Phoenix company asked plaintiff, in case he bought the furniture, to retain the insurance. Plaintiff said he would do so, and wanted the agent to keep the insurance in force. This the agent promised to do, and left with plaintiff a renewal receipt, filled out in the name of Genslenger, purporting to continue the \$5,100 policy for one year from 3rd January, 1902. The renewal premium was not in fact paid, and after the fire the Phoenix company denied any liability to plaintiff or to any one else. Plaintiff brought suits against the Phoenix and the Union, and against the agent. The suits were not brought to trial, but were settled for a sum said to be for costs. There was no recovery for loss on the Genslenger property.

Neither the \$1,000 insurance nor the \$5,100 insurance was in force at the time of the fire. Apart from that, the property covered by defendants' policy was not the same as the property covered by these other policies. *Mason v. Phoenix Ins. Co.*, 23 C. P. 37, *Bruce v. Gore District Mutual Ins. Co.*, 20 C. P. 207, *Gardiner v. Waterloo Mutual Ins. Co.*, 18 A. R. 231, *North British and Mercantile Ins. Co. v. Insurance Co. of London and Globe Ins. Co.*, 5 Ch. D. 569, referred to. . . . The insurance sued for was not against the same loss as in the other policies referred to, but against loss on other goods. The Genslenger insurance cannot be considered as "concurrent" with insurance upon property which he never owned, or as applicable to any other property than that which plaintiff purchased from Genslenger's estate. The question arises in this action as to the policy which plaintiff himself held in the Union for \$2,500. That covered plaintiff's own furniture, and therefore the "same property." There were insurances on this property of \$6,000. The loss was \$7,264.74, so no question of contribution arises on this alone. There was not any admission by plaintiff in proceeding for loss of any insurance upon the same property such as was contended for by defendants. Judgment for plaintiff for money in Court and \$937.53 in addition, with costs.

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STREET, J.

JULY 4TH, 1903.

TRIAL.

McFADDEN v. BRANDON.

Initiation of Actions—Covenant in Mortgage—Acceleration of Time for Payment of Principal—Default of Payment of Interest—Commencement of Statutory Period—Potential Relief from Consequences of Default.

Action to recover the principal and interest payable upon covenant made by defendant with plaintiff contained in a mortgage of land in Ontario, dated 15th March, 1879. The proviso in the mortgage was that it should be void on payment of \$600, with interest at 8 per cent., at the expiration of five years, with interest in the meantime at the same rate, payable yearly on 15th March, in each year, the first payment of interest to be made on 15th March, 1880. The mortgage was expressed to be made in pursuance of the Act respecting short terms of mortgages, and contained the usual statutory covenant for payment of the mortgage money and interest, and the provision "that in default of payment of the interest hereby secured the principal hereby secured shall become payable." The action was begun on 5th May, 1903. No sum had ever been paid upon either the principal or interest secured by the mortgage. Defendant pleaded that the cause of action arose more than 20 years before the action was begun.

E. Meredith, K.C., for plaintiff.

T. H. Purdom, K.C., for defendant.

STREET, J.—The failure of defendant to pay the instalment of interest which became due on 15th March, 1880, accelerated the payment of the principal, which immediately on such default became due, etc., as set out in col. 2 of the

Short Forms of Mortgages Act. This provision is treated as the contract of the parties, and the party advantage of it is not to be treated as claiming a penalty for forfeiture: *Wallingford v. Mutual Society*, 5 App. Cas. 1384; *Wilson v. Campbell*, 15 P. R. 254; *Graham v. Ross*, 6 P. R. 384. Plaintiff was entitled to have brought his action to cover both principal and interest on 16th March, 1888, his cause of action having then arisen. He is barred by the Statute of R. S. O. ch. 72. *Kemp v. Garland*, 4 Q. B. 519, and *Butcher v. Butcher*, [1891] 2 Q. B. 509, followed. This covenant forbids from the contracts in these two cases in this, that it contains a term not found in them, that upon payment of judgment of the arrears of interest and costs, the mortgagor shall be relieved from the effect of his default; but the cause of action for recovery of principal and interest arose upon default, although the contract permitted defendant to go away with the stipulated consequences of the default, and to restore the original terms of payment, by doing some act which has not been done in this case.

Action dismissed with costs.

STREET, J.

JULY 4TH.

TRIAL.

ST. LAWRENCE STEEL AND WIRE CO. v. L.

Guaranty—Construction—Future Liability.

Action upon a guaranty. The Wray Corset Co., partnership, ordered goods from plaintiffs and had been indebted to them in paying the drafts upon them. They were indebted to plaintiffs for the amount of certain goods which they had received, and had ordered other goods, which plaintiffs refused to send. On 10th May, 1901, plaintiffs telegraphed to the Wray Corset Co., "Let Mr. Leys wire guaranty for payment of all accounts to us, and everything will be satisfactory." Defendant authorized a telegram to be sent to plaintiffs in the following words: "Will guarantee payment of all accounts for Wray Corset Co. F. B. Leys." Defendant was told that certain goods ordered from plaintiffs were detained until payment should be guaranteed by him. The goods then under order were sent on by plaintiffs on the faith of this telegram, and were afterwards paid for by the Wray Corset Co., who also paid for all the goods for which they owed plaintiffs at the time the guaranty was given; but the Wray Corset Co. continued to deal with plaintiffs until the former stopped payment some months afterwards, when they were indebted to plaintiffs for goods purchased since

ranty, the amount of which indebtedness plaintiffs claim from defendant.

G. H. Watson, K.C., for plaintiffs.

G. C. Gibbons, K.C., for defendant.

STREET, J.—In ascertaining the extent of defendant's engagement, the rule of construction to be applied is, that the gauge, being that of defendant himself, should be construed rather in favour of the other party, because it was the duty of defendant to frame it so as not to mislead the person to whom it was addressed. At the same time defendant's liability must not be extended beyond the limits of the language he employed, but the words are to be read as strongly against him as the sense will admit of: *Mason v. Pritchard*, 1 East 227; *Hargrave v. Smee*, 6 Bing. 244, 248; *Mayer v. Mac*, 6 M. & W. 605; *Wood v. Priestner*, L. R. 2 Ex. 66; *St v. Brown*, 4 D. F. & J. 367, 376. . . . So regarding the contract, the plaintiffs were justified in placing upon the construction they now contend for, and upon which they have acted, viz., that it was a guaranty of payment of accounts, future as well as past, incurred or to be incurred by the Wray Corset Co. . . .

Judgment for plaintiffs for \$556.53, with interest from 1st September, 1902, on \$516.37, and costs of the action.

STREET, J.

JULY 6TH, 1903.

TRIAL.

WHITNEY v. BRUCE.

Deed of Goods—Conditional Sale—Property not to Pass—Affixing to Freehold—Rights of Owner—Lien Note—Alteration after Execution—Invalidity—Conversion of Goods.

Action for conversion of chattels. Plaintiff was a tinmith carrying on business in Woodstock, and had agreed to supply to the Oxford Creamery Co., a corporation of which he was a member, at their creamery in the township of Westford, a quantity of machinery and plant and iron piping for use there. The creamery building was erected upon a small parcel of land forming a part of defendant's farm, which the company had agreed to buy from him, but which had not been paid for. Plaintiff said he stipulated that the title to the goods should not pass until the money was paid, and this arrangement was not made until immediately before the 19th April, 1899, and then applied to only part of the property. Some 900 feet of iron pipe had been delivered on 1st February, 1899, and been sunk in the ground as soon

as possible afterwards; a water tank had been supplied 1st February, 1899; three radiators had been delivered March, 1899; the other things were delivered about April, 1899. A lien note for \$473.50 was signed on April, 1899, by the president of the company; but he refused by plaintiff, and in substitution for it a new lien was prepared, bearing the same date, and signed by the defendant for \$305.50 only, and was sent by post to the secretary for signature. It did not reach him for some days, and he signed it and returned it to plaintiff, but not until 30th April or 1st May, when the ten days from date allowed for signing had expired. Thereupon the president, at plaintiff's request, altered the date from 19th April to 22nd April, and it was registered on 1st May. The secretary was not notified of the alteration. The plaintiff claimed upon this lien as altered and registered. The articles covered by it were 4 vats, a can, a heater, a pair of scales, and 3 radiators, which except the can and scales formed part of the fixed equipment of the creamery works, and they were fixed to the building by plaintiff's own men. The company never went into possession and never paid defendant for the land, and he remained in possession in May, 1899, and locked up the building which contained the above articles. In 1902 defendant sold the vats and the can, and took up and sold or gave away some of the piping.

A Bicknell, Woodstock, for plaintiff.

H. L. Drayton, for defendant.

STREET, J.—The lien note for \$473.50 can not be taken into account because plaintiff refused to accept it; the \$305.50 was invalid by reason of the improper and unauthorized alteration of its date. The operation of the Conditional Sales Act is, therefore, entirely excluded from consideration. The chattels which were affixed to the freehold became part of it by plaintiff's own act, and the freehold was always defendant's property, subject to the right of the company to acquire it by paying the purchase money. On the evidence, there was no intention to retain the property in any of the chattels not mentioned in the lien note for \$305.50, so that only the can and the scales are to be considered at all. With regard to these, plaintiff intended to retain the property until payment, and so stipulated with defendant, not being a subsequent purchaser or mortgagor for value, is not within the protection of the Conditional Sales Act. There was a conversion by him of the above articles. Judgment for plaintiff for \$20 and costs. Division Court scale of the issue as to these two articles.

defendant to have the general costs of defence of the action on the High Court scale, less the costs of the issue on which plaintiff succeeded; these costs to be set off against plaintiff's judgment for \$20 and costs, and execution to issue for the balance found due to either party.

STREET, J.

JULY 7TH, 1903.

CHAMBERS.

RE ENGLEHARDT.

Administration—Summary Application for Determination of Questions—Domicil of Intestate—Persons Entitled to Share in Estate—Evidence—Certificates of Births, Deaths, and Marriages—Administration Order.

Application under Rule 938 for the determination of the following questions: (1) Whether H. A. Englehardt, deceased, had at the time of his death acquired an Ontario domicil or retained his German domicil of origin, in order that it might be determined by what law his estate of about \$10,000 was to be distributed. (2) Who were the persons entitled to share in his estate and in what proportions. The application was made on behalf of the Toronto General Trusts Corporation, administrators of the estate.

R. C. Levesconte, for the applicants and certain creditors.

W. R. Smyth, for the Strumpfler family, residing in Germany.

STREET, J.—As to the first question, there is no evidence beyond the fact that the deceased resided in Toronto for 18 years and probably never became a British subject by naturalization. Upon this evidence the finding would have to be that the deceased was domiciled here. To answer the second question the Judge would have to trace the descendants of "the clothmaker Johanne born Demme," who died and had a large family and died at Mulhausen, in Germany, in the latter part of the 18th or the early part of the 19th century; also of Heinrich Conrad Tamm and his wife Johanna Juliane Beohstedt, who died at Langensalza, in Germany, between 1830 and 1840. Here they had a large family also. The proof offered of the numerous births, deaths, and marriages involved in this inquiry, consists of a series of certificates, some of them purporting to be official, some of them of private persons, but none of them being receivable in evidence in this Province,

for sec. 29 of the Evidence Act relates only to public documents kept within the jurisdiction of the Court, because the officer in charge of them is ordered to furnish copies. The estate to be administered is a very considerable one, and the facts upon which its distribution depends are too complicated to be determined upon a summary application of that nature. Sub-section (h) of Rule 938 should only be applied to simple questions of fact, as to which there is no or no room for dispute. Upon the alternative application of the administrators, an order may issue for the administration of the real and personal estate of the deceased, treating the motion as made for that order merely.

FALCONBRIDGE, C.J.

JULY 7TH,

CHAMBERS.

NOEL v. NOEL.

Partition — Dispute as to Title — Summary Application — Leave to Bring Action.

Motion by plaintiff for order for partition or sale of land.
W. J. Tremear, for plaintiff.

F. J. Roche, for defendant J. J. Noel.

F. W. Harcourt, for infant defendant.

FALCONBRIDGE, C.J.—Defendant J. J. Noel disputes the right to partition, on the ground that he is the beneficial owner of the land. The burden of proof is on him, the registered title being in the name of his late wife. He must bring an action to establish his claim before 15th September next. Should he not do so, the order for partition will issue on that day.

MACLAREN, J.A.

JULY 7TH, 1870.

WEEKLY COURT.

ASSELSTINE v. FRASER.

Waste—Life Tenant—Tenant in Common—Cutting Timber—Act of 1870—Statute of Limitations.

Motion by plaintiffs for judgment on the pleadings and admissions. Michael Asselstine, of Ernesttown, died on 9th October, 1870, seised of about 300 acres of land in the township, which he devised to his two daughters Sarah and Elizabeth as tenants in common. They remained in joint possession until 5th May, 1885, when Sarah Ann died, leaving a will by which she devised her undivided half interest to her mother and her sister for their natural

and directed that after the death of the survivor the lands should be sold and the proceeds divided among her nephews and nieces, now represented by plaintiffs. The mother died, and Elizabeth remained in possession until her death, on 4th September, 1902. Defendants are her executors. In partition proceedings between plaintiffs and defendants the lands were sold on 28th November, 1902, for \$5,500. In this action plaintiffs allege that between 1885 and 1902 Elizabeth Asselstine cut and removed from the lands large quantities of wood and timber and parts of the buildings thereon, and that but for these wrongful acts the lands would have sold for \$9,000.

C. A. Masten, for plaintiffs.

A. B. Aylesworth, K.C., for defendants.

MACLAREN, J.A.—Elizabeth Asselstine had a right as tenant in common and life tenant to cut down and use wood and timber for firewood and repairs on the lands in question, and also, so far as might be done, in the course of good husbandry, but not otherwise. Defendants are entitled to the benefit of the Statute of Limitations, so that they are only liable for six years. There should be a reference to the Master at Napanee to take the account of such wood, timber, and buildings removed from the lands in question. See *Woodenow v. Farquhar*, 19 Gr. 614. Plaintiffs will be entitled to one-half the amount so found. Further directions and costs reserved.

BRITTON, J.

JULY 7TH, 1903.

TRIAL.

UPTON v. ELIGH.

Sale of Goods—Contract—Correspondence—Breach—Non-delivery—Action against Executors of Vendor—Corroboration.

Action by plaintiff* against the executors of the late Hebron Harris for damages for non-delivery of 100,000 railway ties in the fall of 1899 and during the season of navigation of 1900, pursuant to an alleged contract made by correspondence between the plaintiff and Hebron Harris in his lifetime.

G. F. Henderson, Ottawa, for plaintiff.

G. E. Kidd, Ottawa, for defendants.

BRITTON, J.—The plaintiff is a wholesale dealer in lumber, carrying on business at Charlotte, New York. Harris

was a large dealer in ties, and resided at Ottawa. The correspondence commenced by a letter of inquiry from the plaintiff to Harris, dated 25th August, 1899, informing him that the plaintiff desired to buy any part of 100,000 No. 1 standard cedar ties for delivery at Buffalo on or before 1st September, 1900, and asking Harris to name a price. On the 29th September, 1899, F. S. Upton, who was and is in the employ of the plaintiff, visited Ottawa and had a general conversation with Harris on the subject, but no contract was made. And, in my opinion, nothing turns on this conversation. The parties fully understood one another as to what was intended, and in reference to which the correspondence was continued.

On the 31st August, 1899, Harris wrote to the plaintiff in reply to plaintiff's letter of 25th, as follows: "We will deliver you 100 M. standard cedar ties on 1st September at Fair Haven, N.Y., at 35 cents a piece, duty to be paid by you. I could probably deliver 25 to 30 M. this fall. The balance as early as they could be got out next spring. Assume that this was 'an option,' as plaintiff called it, open to him until the 15th September, what did plaintiff do? First, he wired an acceptance of the offer, and then he qualified that acceptance by a letter to Harris. That letter is as follows: 'I have just wired you that I will take 100,000 standard No. 1 cedar ties that you offered me on 31st August at 35 cents each, delivered free of duty at Fair Haven, N.Y., duty to be paid by me, all of which I will confirm. You may commence shipping at once, and deliver the balance as early this fall as possible, at least 25 to 30 M. the balance as early next spring as possible, and not later than 1st August, to be counted and inspected at destination and paid for in 30 days after arrival and inspection. They will all go to Fair Haven, N.Y., but may possibly be taken up some at Charlotte, as the writer explained when there.' That letter, in fact, as the plaintiff intended, and as Mr. Upton evidently understood, superseded the telegram. That letter was not an acceptance of the offer of Harris, but brought in new terms and conditions. Harris said he would probably deliver 25 to 30 M. that fall. Plaintiff said he must deliver at least 25 to 30 M. that fall. Plaintiff stipulated that all should be delivered not later than 1st September, 1900. Plaintiff stipulated that the ties were to be counted and inspected at destination, and that they were to be paid for in 30 days after arrival and inspection. Whatever plaintiff intended by it, he said he might take some at Charlotte. Charlotte is a considerable place, much farther from the place of shipment than Fair Haven.

This is by no means an acceptance of the offer—the ties were not together. Mr. Harris did not reply to this offer until 23rd September, and then, by letter of that date to the plaintiff, he withdraws his offer of the 100,000. The letter is as follows:—"Referring to your telegrams and letters in connection with delivery of cedar ties to Fair Haven, N. Y., I could not undertake to deliver the quantity of ties specified in your letter, but could *probably* deliver 50 M. standard cedar ties at the price named, 15 M. of which would be delivered this fall, if cullage was satisfactory, and the balance in August, 1900. I cannot say definitely how soon this fall's ties could be delivered, as I would first have to arrange with transportation companies to carry them. If you can do it on the above basis, kindly advise me, and I will arrange at once for the freighting of this fall's delivery."

This letter may be considered in a two-fold aspect. First, it definitely puts an end to the negotiation for the 100,000 ties. I find as a fact that there was no agreement for the delivery of the 100,000 ties. Secondly, this letter contains a new offer, not to deliver 50,000, because Harris puts that number as only a probable number, but he couples with this probability a definite statement that 15,000 would be delivered that fall, conditioned only upon "cullage" being satisfactory. This letter was received by plaintiff on the 26th September, and he immediately wired reply. The telegram was not an acceptance of the new offer, but it was a message building on to the former offer, and expressing a desire to deliver the 50,000 as part of the 100,000. On Saturday the plaintiff wrote to Harris, repeating and confirming the telegram, and then accepting what plaintiff assumed to be a new offer of 50,000. Harris, as stated, had not definitely offered 100,000—but I think he did offer the 15,000, and that plaintiff accepted that offer. In fact, plaintiff was then willing to accept any number Harris would agree to deliver.

Further correspondence followed, and Mr. Harris seemed anxious to carry out this last contract—but he found more difficulty in getting transportation than he had expected. Plaintiff tried to help the other in that respect but without success. Plaintiff was urgent about getting ties, and on the 10th October Mr. Harris wrote to plaintiff stating that he had been unable to secure transportation for the ties, and that, as the season was so far advanced, he had abandoned the idea of delivering any that fall. Mr. Harris did not in that letter say more. The correspondence was kept up during the fall, and Mr. Harris did not repudiate until 28th March, 1900, when he wrote to plaintiff informing him that, if the price of ties had advanced 8 to 10 cents, he would not

deliver unless plaintiff was prepared to pay a much better price than the figures offered last season.

I think there was a contract for the delivery of 15,000 ties, and that the plaintiff should recover damages for the breach of that contract. The contract may fairly be collected from the whole terms of the correspondence. See *Bruce v. Tolton*, 4 A. R. 144; *Hussey v. Horn Payne*, 4 App. Cas. 311; *Thomson v. Mathieson*, 30 S. C. R. 357. Upon the whole case see *Fulton v. U. C. Furniture Co.*, 9 A. R. 211.

Mr. Harris was sick in the early part of the season of 1900, and died on the 24th day of June of that year. If he had not died, probably the claim would have been adjusted. The action being against the executors, it was objected that there was no corroboration of F. S. Upton's evidence. F. S. Upton is not a party to the record, but the liability, if any, is made from the correspondence, about which there is no dispute. I think the estate is liable for non-delivery of the minimum quantity as shewn by the correspondence. The deceased failed to deliver any during the fall of 1899, and by his letter of 28th March, 1900, he refused to deliver during 1900, except at a considerably higher price. That letter would warrant an assessment of damages of 8 cents each tie, but the witness for the plaintiff puts the loss at less. He says the difference in price between what these ties would have cost, and those purchased by him at Fair Haven, after duty was paid, was about 7 cents each tie. I assess the damages at \$1,000, which is a little less than 7 cents each for 15,000.

Plaintiff sued upon a contract for 100,000. He may amend, if necessary, so as to entitle him to recover on contract as found. Judgment for plaintiff for \$1,000. Defendants must pay costs. Thirty days' stay.

BRITTON, J.

JULY 7TH, 1903.

TRIAL.

GARROCH v. PURVIS.

Sale of Goods—Contract—Correspondence—Ship—Bill of Sale—Action for Price—Property Vesting—Action for Damages for not Accepting—Delay.

Action for not accepting and paying for the steam tug "Island Belle," \$150, in pursuance of an alleged contract of sale, made by correspondence between the parties.

Tried at Parry Sound, 19th May, 1903, before BRITTON, J., without a jury.

W. J. Hanna, Sarnia, for plaintiff.

R. R. McKessock, Gore Bay, for defendant.

BRITTON, J.—The plaintiff, a merchant residing at Sarnia, is the owner of the tug in question. The defendant, during the season of 1902, was the keeper of the light house on Duck Island, Lake Huron. His usual place of residence was Gore Bay, Manitoulin. This steam tug was, during the season of 1901, in charge of one John S. Nesbitt, a relative of the plaintiff. Nesbitt left the boat on the beach at Gore Bay in 1901, and she was there when the negotiations now under consideration took place. Nesbitt had made a sale of this boat to one La Rue Smith, or to Smith & Henderson, and a bill of sale, signed by plaintiff, was on the 17th May, 1902, sent by Nesbitt to Little Current for delivery to Smith, on payment of the purchase price. On the 24th May, 1902, plaintiff had been informed that Smith would not carry out his purchase, but the bill of sale had not then been returned, and in fact was only returned to Nesbitt, by letter from Little Current, dated the 5th June, 1902. On the 24th May plaintiff wrote an unsigned letter to the defendant. It was suggested at the trial that the letter was purposely left unsigned—because Nesbitt had been up to this time conducting all the business in reference to this tug, and, as the sale to Smith was pending, Nesbitt or the plaintiff or both thought it better to have another string to the bow, and see what could be done with the defendant. I think not signing the letter was mere inadvertence. The letter was on the plaintiff's letter paper—with his name and business at the top—and is as follows:—

“Sarnia, May 24th, 1902.

Mr. Purvis, Esq.,
Duck Island, Ont.,
via Wiarton.

Dear Sir,—I received a letter from Capt. Wm. Glass saying you would pay \$550 cash for the “Island Belle,” as she is, at Gore Bay. I accept the offer and will forward a bill of sale to any place you may name. How would it be to send it to Traders Bank at Wiarton, to be handed to you on receipt of the money? There are no debts against her, but if you want a bond to that effect, I will forward you one.

Yours truly.”

The defendant received this letter in due course, treated it as coming from the plaintiff, and replied to it on the 4th June, as follows:—

“Duck Island, Ont., June 4th, 1902.

Mr. John Garroch,
Sarnia, Ont.

Dear Sir,—I received your letter re “Island Belle” a few days ago. I will pay you \$550 cash for the tug, as she is,

and you may send the bill of sale to Hurst & Burke's bank, at Gore Bay, Ont.

I would prefer it to Wiarton, as I can be there personally. If it is convenient, I would like you to send a bond shewing that there are no claims, &c., on the tug. Will you kindly make the bill of sale out in my wife's name, Sara A. Purvis, if it is convenient? Otherwise do not bother.

Yours very truly,

John Purvis."

To this letter plaintiff replied:—

"Sarnia, Ont., June 10th, 1902.

John Purvis, Esq.,

Duck Island, Ont.

Dear Sir,—I have your favour of the 4th, and will forward papers in your wife's name as requested to the Union Bank at Wiarton as soon as I can have them made out.

Yours truly,

John Garroch."

The letter of plaintiff of the 24th May may be considered as an offer to sell for \$550. There had been no offer at that time from defendant to plaintiff to buy. The letter of June 4th from the defendant to plaintiff was an acceptance of plaintiff's offer—subject to plaintiff's sending the bill of sale of the boat to Hurst & Burke's bank, at Gore Bay. The boat was there; she was to be paid for there; the bill of sale and the boat were to be delivered there. The plaintiff misunderstood the defendant's letter. He says he understood that the defendant would prefer to have the bill of sale go to Wiarton. The letter I think plain enough, that defendant would prefer Gore Bay to Wiarton; and it is difficult to see how plaintiff could misunderstand it, as he says, and as I believe, he did. Wiarton is 200 miles from Duck Island; Gore Bay is only 60 miles, and, as the boat was at Gore Bay, the defendant was entitled to make the condition that the bill of sale was to be delivered at Gore Bay. The steam tug was a registered vessel. Defendant was offering for her as such, and was entitled to have the formal bill of sale before he could be asked to accept delivery of the boat, or to pay his money. The plaintiff was treating the matter in precisely the same way. He was selling the boat and her belongings as she was on the 24th May, but plaintiff was not offering any delivery of the boat until defendant would get the bill of sale, and pay over the money. The bill of sale was to be handed to the defendant on receipt of the money.

But assume that there was no question about the place where the bill of sale was to be sent, what is the position of

matter? Plaintiff's letter of the 10th June was an acceptance of the defendant's offer. The plaintiff undertook forward, using his own language, "papers in your wife's name as soon as I can have them made out." This must be interpreted, within a reasonable time, and reasonable time would depend upon circumstances. It was in the season when the boat was required and when every day would or might mean a loss. It is in evidence that the defendant chartered a boat named "Edna Ivan," that defendant had intended to do, and that June is about the most busy month. The bill of sale was not sent until 2nd July; that was 22 days after plaintiff had promised it would be done, "as soon as the papers could be made out." I do not think the bill of sale was sent within a reasonable time. That a little delay on occasion loss, is shewn by what took place in reference to the steam tug. Very likely the value of the articles removed from the tug was less than defendant contended for at the trial—but I must find upon the evidence that some articles, and of value, were removed from the boat between the 4th June, the date of the defendant's offer, and the date of the plaintiff's acceptance. The plaintiff was not in a position to deliver on the 2nd July what plaintiff intended to deliver and what defendant intended to buy. I do not think there was a completed agreement between the parties. There was an adoption by the defendant of the plaintiff's offer of delivery of the bill of sale. There never was an agreement by the defendant to the change which plaintiff made arising from plaintiff's letter of the 4th June. It was the intention of the parties that the property in the steam tug should not pass to or vest in the defendant until he had accepted the bill of sale and paid the \$550. If there was a contract between the parties, it was executory only. This fault, which has resulted in an expensive litigation, has not arisen from the fact of plaintiff and defendant living far apart, and the boat being so far from each. If plaintiff had agreed to let defendant have possession of the boat at once, and had undertaken, giving security if necessary, to give a good title, very likely that would have been very satisfactory to the defendant. It is not, however, for me to speculate upon what might have been. I would be glad if I could see my way upon the evidence to give the plaintiff some relief, as the boat has no doubt deteriorated pending this litigation, but it is not a case, in the view I have taken of it, attempting to do equity by compelling defendant to take the steamer after an abatement of the purchase money to the extent of articles removed from the boat, and by allowing damages occasioned to defendant by delay.

I think the action should be dismissed with costs, that the counterclaim should be dismissed with costs.

Bill of sale to be handed back to plaintiff and to be cancelled.

If case goes further, and if it shall be held that plaintiff is entitled to the purchase money by reason of the purchase having vested in the defendant, I think defendant should be allowed \$50 for articles removed from steamer, and damages by reason of delay on part of plaintiff in making bill of sale, and in that case the title to be made a registered title of the boat.

If it should be held that plaintiff is entitled to damages for non-acceptance of the steamer, I am of opinion that damages should be \$200; in that case the plaintiff to have the boat.

Action dismissed with costs.

BRITTON, J.

JULY 8TH

CHAMBERS.

GAULT v. PENTECOST.

*Judgment Debtor—Examination—Unsatisfactory Answers—
factory Disposition of Property—Actions Pending with
to—Continuation of Examination—Explanations.*

Application by plaintiffs under Rule 907 to compel defendant for unsatisfactory answers upon his examination as a judgment debtor. The examination was begun at 10 o'clock on the 19th February, 1903, and continued on the 20th and 21st March. On that day plaintiffs desired an adjournment for a further examination with production of books and papers. The examiner granted an adjournment until 25th March, but defendant did not attend, and refused to accept \$100 to conduct money from Hamilton, where he lived.

Joseph Montgomery, for plaintiffs.

Hamilton Cassels, K.C., for defendant.

BRITTON, J.—Defendant has answered freely and honestly except to a few questions, and his answers were appropriate in the main, truthful, but they certainly disclosed an extraordinary course of dealing. The answers complained of as unsatisfactory may be grouped under the following: (1) Want of knowledge of defendant's own books and papers; (2) Assignment of them to his brother. (2) Inability to explain his most disastrous failure. (3) His brother unexpectedly appearing as a creditor for a large amount. (4) Selling property otherwise than in the ordinary course of business and

not in the trade. (5) Fraudulent disposal of goods and wronging creditors. (6) Selling out the business under circumstances appearing, taking notes, and handing them to a preferred creditor. It cannot be determined by this application whether defendant had or had not a right against plaintiff to make an assignment of debts and hand the books to his brother. In a sense the answers to the questions on the examination are unsatisfactory, but the facts do not appear, and it does not appear that plaintiff have instituted proceedings against defendant and others for interference to the transactions, about which he was questioned. If defendant had the right to do what he did, he was not to be committed merely for telling about it. If defendant had not the right, plaintiffs should get redress by action they have begun. . . . Application to commit dismissed without costs.

If plaintiffs desire to continue the examination for purposes intended when the adjournment took place, they are ordered by an order that defendant attend at his own expense and submit to be further examined, and he may on examination give any explanation of matters as to which he has already answered. See *Foster v. Vanwormer*, 10 R. 597. The assignee and the brother of defendant shall facilitate reference to all books and vouchers. This order to be without prejudice to any future or other application which plaintiffs may desire to make in regard to the examination as a whole. No examination in vacation unless by consent.

WILSON, J.

JULY 8TH, 1903.

WEEKLY COURT.

MACDONALD AND VILLAGE OF ALEXANDRIA.

Municipal Corporations—Drainage—Petition—Alteration of Route of Drain—Engineer—Adoption by By-law—Quashing By-law—Costs.

Petition to quash by-law 243 of the village, passed on 2nd November, 1902, to provide money, by the issue of debentures secured by a special rate, to pay for the construction of a drain on Main street in the village from a point 33 feet south of the northerly side of St. George street to the north of Catharine street, thence easterly along Catharine street to a point opposite to lot A., then southerly through said lot to the river Garry. The by-law recited that the petition was presented by the owners of real property to be benefited to the council for the construction of a drain on

Main street from Kincardine street to the river Garry. The total cost of the drain was \$3,644.

M. Wilson, K.C., for applicants.

J. Leitch, K.C., for the village corporation.

BRITTON, J.— . . . The engineer had no authority to alter the route in the manner he did, substantially making a new work and one not asked for. The council should not have accepted the new route without a new petition, unless they were prepared to enter upon it and proceed under sec. 669 of the Municipal Act. The distinction between local assessments, or assessments for local improvements, and those for general revenue purposes, must be recognized. The statute giving the power of local taxation must be strictly followed: *McCullough v. Township of Caledonia*, 25 A. R. 417. The council acted in good faith. Although the cost is larger than estimated, the amount is not oppressive. Upon the evidence, the work is a beneficial one to the village. Therefore, the costs should be limited. Order made quashing the by-law, with costs fixed at \$80.

JULY 8TH. 1903.

DIVISIONAL COURT.

SOUTHAMPTON LUMBER CO. v. AUSTIN.

Contract—Unascertained Goods—Appropriation—Passing of Property—Acceptance and Part Payment.

Appeal by defendant from judgment of LOUNT, J. (1 O. W. R. 548), which was partly in favour of plaintiffs for the recovery of \$700 in an action for a balance alleged to be due on a contract for a supply of railway ties, posts, and pavements, and dismissing defendant's counterclaim.

J. H. Rodd, Windsor, for defendant.

C. A. Masten, for plaintiffs.

FALCONBRIDGE, C.J.—There was no cross-appeal by plaintiffs as to the ties, in respect of which the judgment was in defendant's favour. The only question was as to the posts. The trial Judge found that the request by defendant to peel posts was an acceptance of all the posts, and a waiver of the right to inspect. Plaintiffs have established satisfactorily the peeling (and payment therefor) of only 9,212 posts, and to this extent only has there been an acceptance and passing of the property. In no view of the evidence was there any acceptance or appropriation so as to pass the property in the

the quantity provided for by the contract. Judgment was given for the plaintiff for the sum of \$410.60. No costs of appeal.

BRITTON, J., gave reasons in writing for the same conclusion.

JULY 8TH, 1903.

DIVISIONAL COURT.

SISTY v. LARKIN.

Drainage and Watercourses—Government Ditch—Government Contract—Damming back Water on Plaintiff's Land—Justification—Orders of Government—Negligent Execution of.

Appeal by defendants from judgment in favour of plaintiff for \$75, pronounced by the Judge of the County Court of Frontenac, Dundas, and Glengarry, upon the answers of the defendants in an action to recover damages for injury done to fruit trees growing in plaintiff's garden by water dammed back by defendants.

W. Leitch, K.C., for defendants.

D. B. Maclellan, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., and BRITTON, J.) was delivered by

BRITTON, J.—The ditch in which the drain was placed was a Government ditch, extending for a considerable distance across the plaintiff's land. The persons whose lands lay along the ditch had for 30 years been in the habit of draining the surface water from their lands into it. The ditch collected the drainage from the upper lands and brought it past the lands occupied by plaintiff. Defendants have built a drain across it below plaintiff's land. The jury found that the result of the dam was to flood and damage plaintiff's land. The facts make a *prima facie* case for plaintiff. Defendants answered that what they did was upon Government land. In reply to that is, that they had no right to go upon Government land and wrongfully block up a ditch to the damage of plaintiff. Defendants next say that what they did was done under the direct order of the Government, and that the Government alone was liable. . . . All that was shewn was that defendants undertook to do certain work for the Government which involved the building of a flume to carry the water usually flowing along the drain; that this flume was not built of sufficient size to carry off the water; and that the result was the damage to plaintiff. The work which defendants were doing for the Government was, therefore,

done by them so negligently as to cause the damage, and they are responsible to plaintiff. It was not because of the work required by Government, but because it was negligently done by defendants, that plaintiff suffered damage. The Government seems to have permitted the upper landowners to drain into the ditch for a sufficient period to give them the right to do so: R. S. O. ch. 133, sec. 35; McGee v. The King, 7 Ex. C. R. 309. Appeal dismissed with costs.

FERGUSON, J.

JULY 9TH, 1903.

TRIAL.

JARVIS v. GARDNER.

Contract—Sale of Land—Fraud Alleged by Vendor—Action for Cancellation—Evidence as to Coercion—Fair Value—No Improvidence—Counterclaim by Purchaser for Specific Performance—Contract not Signed by Purchaser—Want of Mutuality—Adoption by Counterclaim—Statute of Frauds.

Action brought for the purpose of having a certain document signed by the plaintiff declared to be void and of no effect and to have the same delivered up to be cancelled.

G. F. Shepley, K.C., J. Leitch, K.C., and J. F. Orde, Ottawa, for plaintiff.

G. H. Watson, K.C., and J. Dingwall, Cornwall, for defendant.

FERGUSON, J.—The plaintiff was the owner of a valuable farm lying near the town of Cornwall which had been conveyed to her by her late father, Mr. Sheriff McIntyre, in his lifetime. This farm she had rented to the defendant, who was in possession of it and paying rent. He had paid the rent in advance to the first day of April, 1903.

Notwithstanding the many assertions of the plaintiff in her evidence that she never did sell or endeavour to sell this farm, I cannot but find, upon the evidence, that, after more than one conversation between her and the defendant regarding the purchase and sale, they met at the plaintiff's place some time early in the month of March last and agreed upon the price and mode of payment of it; the plaintiff, however, saying that she would not conclude a bargain till after consulting with Mr. Smart.

Mr. Smart is a gentleman who had been deputy sheriff under the plaintiff's father for a long series of years and who was very intimate and friendly with the plaintiff and her mother, who survives the late sheriff and is far advanced in

fe. He is one of the executors under the will of the plaintiff's father and has taken an active part in the management of the estate, and out of it provided money for the maintenance of the family, who were entitled to it. In this way there were long years of intimacy between Mr. Smart and the plaintiff and her mother. This appears to have been the reason that the plaintiff wanted to consult with Mr. Smart before concluding the bargain for the sale of the farm to the defendant. Mr. Smart is also deputy sheriff still under the predecessor in office of the plaintiff's father.

After the interview between the plaintiff and the defendant above mentioned at which they had agreed upon the price of the farm, the plaintiff sent for Mr. Smart. She told him how the matter stood; that she was to get \$7,000 for the farm, \$4,000 in cash and \$3,000 left upon a mortgage upon the farm for five years at 4 per cent. interest. He, as it appears, advised her to take in ready money a less sum, \$3,500 and to have \$3,500 on the mortgage, and that he thought she should have 5 per cent interest upon the mortgage money. She (the plaintiff) then instructed Smart to see the defendant and if he would agree to these terms to conclude the contract, leaving him at liberty to conclude it even if he could not get the 5 per cent., and it was then stated that Mr. Dingwall should draw the documents or act as the solicitor for the plaintiff in the conveyancing. In other words, the plaintiff chose Mr. Dingwall to draw the papers. Mr. Smart saw the defendant, who, after discussion and some hesitation, agreed to the proposals. The defendant also selected Mr. Dingwall as his solicitor in the conveyancing. Mr. Smart and the defendant then went to Mr. Dingwall's office and gave him instructions to draw a deed of the farm and the mortgage back securing the half of the purchase money. Mr. Dingwall said that he had not time that day to draw the deed and mortgage, and further said that a sum of money might be paid and a receipt taken for it, he being, as it appears, of the opinion that this would preserve matters in statu quo until the formal conveyancing could be done, and while drawing the receipt he, Mr. Dingwall, remarked that it would be well to insert in it a note or memorandum of the agreement, which he did, and when he had it ready he handed it to Mr. Smart, telling him to get it signed by the plaintiff, giving him, Smart, also a cheque for \$100 to be handed to the plaintiff. This document is as follows:—

100.

Cornwall, March 6, 1903.

Received from James Gardner the sum of one hundred dollars on account of his purchase from me of east half lot in the front or first concession of the township of Cornwall;

the whole price is to be \$7,000, \$3,400 more to be paid in cash on April 1, 1903. For the balance of \$3,500 a mortgage is to be given by Mr. Gardner at 5 per cent., the principal to be paid on April 1, 1908, the interest from April 1, 1903, is to be paid yearly. Mr. Gardner may pay \$500 or more of the principal on said mortgage at any sooner time or times. He is to insure the property for \$1,000. Deed and mortgage are to be executed as soon as ready or prepared. I give or pay for deed and Mr. Gardner pays for all else, including registering deed."

Mr. Smart went to plaintiff's residence in the forenoon of the 6th April, taking with him this paper in blank and the cheque for \$100. He says that when he got into the house he waited for the plaintiff to come downstairs, that he told her he had brought the document and that he read it over to her, that she said her mother objected and that it was hard to get her mother to understand, that she went upstairs to her mother and came down, that he then asked her if he should tear up the paper, and she said no, that she would sign it; that the plaintiff then read over the paper and said she fully understood it, and that he then shewed her where to sign and she signed it, after which he signed as a witness. In his evidence Mr. Smart says that both he and the plaintiff read over the paper alone and she seemed fully to understand it before she signed it, and that she said so. He says that he left the cheque but took the document away with him and gave it to Mr. Dingwall.

The plaintiff in her evidence says that on this occasion Smart was angry and violent and forced or coerced her into signing the document, and that just before she signed it she became unconscious, that Smart used the words "sign it," "sign it," "sign it." He, Smart, says that he was not angry or violent, and that he did not force or coerce the plaintiff into signing the paper or endeavour so to do, and that the statement of her being unconscious is quite wrong. He says the plaintiff appeared to be as clear and bright that day as he had seen her for many years. He says emphatically that there was no scheme or design at all in regard to the signing of this paper, and that his only object was to serve the plaintiff, and that he acted as her agent and friend throughout and that he did not act for the defendant at all.

The plaintiff, as appears from the evidence, had for a prolonged period been suffering from nervous prostration, what the doctors call neurasthenia, and medical gentlemen were called with the view of ascertaining what her mental powers and condition were on this 6th March when she signed the document. This evidence is rather long, and I

only take what I consider the effect of it. Dr. Alguire, who had been her attendant physician for many years, said: "I think, under ordinary circumstances, with due deliberation, if she had reasonable time, that she ought to be able to conduct any ordinary business." He says further that he has always found her an intelligent person, and it is manifest that she is a lady of good education. I think these expressions of Dr. Alguire furnish the keynote of his opinion so far as it bears on the question here. Sir James Grant does not entirely agree in this with Dr. Alguire. He seems, however, to pay much respect to the opinion of Dr. Alguire. Sir James was not an attendant physician and saw and examined the plaintiff only once (the day before giving her testimony). I doubt a very learned and experienced witness, yet his evidence must have been purely theoretical. The testimony of Dr. Burgess does not cast much more light upon her condition. According to the professional evidence, especially that of Sir James Grant, her memory was the part of her mind that would be most defective.

Now, I have endeavoured to gather in the effect of all the evidence regarding the mental condition of the plaintiff at the time the paper was signed. I have read throughout the examination for discovery in this action—a large part of which had little or no relevancy to the case—for the purpose of understanding what were her mental powers; and I paid, I think, strict attention to her demeanour and her answers in the witness box at the trial, all with the view of forming a correct opinion of my own upon the subjects, or of giving an opinion as nearly correct as may be. I think the evidence of Mr. Smart, who had known the plaintiff, as he puts it, "all his life," who had done business with and for her, and who was present on the occasion in question, very important. The evidence of the attendant physician, who had known her 15 or 16 years, is also very important. I think the evidence of Mr. Smart as to what took place on the 6th of March when this document was signed is to be preferred. I find that there was not coercion or pressure brought to bear upon the plaintiff to cause her to sign the document. She was not taken by surprise. The subject was not new to her. She had considered the matter of selling her farm before, and the price that she should get for it. There was nothing what has been so often called "improvidence." I find from the evidence that the price she was getting, \$7,000, was the full value of the farm, and the price she was ready and willing to take for it before there was in existence this document or any talk about it.

The plaintiff does not accuse the defendant personally of any fraud. I find that Mr. Smart was not his agent at all. Both the Messrs. Dingwall have been acquitted of all charges of fraud by the statement of plaintiff's counsel in open Court. I do not, as I understand the evidence, perceive any ground upon which I can or should set aside the document sought to be impeached, and I think it should be permitted to stand as a good document.

The defendant claims specific performance of the agreement. He does not plead this in the form of a counterclaim, but, no matter how it is stated, when it is in reality a counterclaim, it must, I think, be so considered, and looking at it in this way, it is in effect another action, in which the defendant is the plaintiff and the plaintiff the defendant.

The sole argument against specific performance was that there is a want of mutuality, and a setting up of the provisions of the Statute of Frauds.

The memorandum is signed by Mrs. Jarvis, the party to be charged, but not by Gardner, who sues for the specific performance. He is, I think, to be considered to be in the same position as if he had under the former practice filed his bill for specific performance.

The position of the parties in such a case is stated in the fourth edition of Fry on Specific Performance, at p. 209, where it is said that the plaintiff by instituting proceedings has waived the original want of mutuality and rendered the remedy mutual. The authorities referred to in Fry seem to make the matter plain. In *Flight v. Bolland*, 4 Russ. at 301, which was the case of an infant, the Master of the Rolls said: "The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the Court, though seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported first because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next it is said that the plaintiff by the act of filing the bill has made the remedy mutual." And then the learned Judge adds: "Neither of these reasons applies to the case of an infant."

See also *Martin v. Mitchell*, 2 J. & W. at p. 427; also *Western v. Russell*, 3 V. & B. at p. 192. See also *Ottway v. Braithwaite*, Finch 405, where a contract contained in a deed poll was enforced, notwithstanding that an objection

ounded on the unilateral nature of the instrument was taken and insisted upon.

I am of the opinion that this defendant Gardner, standing, as I think, in the position of a plaintiff quoad his claim for specific performance, is entitled to the order that he asks in this regard.

The plaintiff's action to set aside the document and to have it delivered up to be cancelled will be dismissed with costs, and the defendant will have the order or judgment for specific performance asked by him. This should also be with costs. But it is apprehended that the costs of the action will not have been very seriously increased by this claim being made.

Judgment accordingly.

JULY 11TH, 1903.

DIVISIONAL COURT.

WAECHTER v. PINKERTON.

Assessment and Taxes—Distress for Taxes—Tender of Part—Divisibility of Amount—Statute Labour—Illegal Assessment—Gross Charge in Lieu of Apportionment by Lots—Imperative Provision of Statute—Costs—Set-off—Solicitor's Lien.

Appeal by defendants from judgment of County Court at South Shields in favour of plaintiff in action by Andrew Waechter against Thomas Pinkerton, the collector of taxes for the township of Greenock, for 1901, and Ezra Briggs, the collector's bailiff, for illegal seizure of plaintiff's chattels as a distress for taxes, and for a return of the goods.

G. F. Shepley, K.C., for defendants.

J. Idington, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J.) was delivered by

BRITTON, J.—The trial Judge found that there was a tender of all taxes except those for statute labour. Defendants contended that tender of part was no valid tender. Tender of part of one entire demand or entire contract debt or liability is ineffective: *Dixon v. Clark*, 5 C. B. 365; but, if tender is specifically made as to one distinct item in an amount fairly divisible into items or parts, it is a good tender to that item. Whether there was specific appropriation by plaintiff when making the tender is a question of fact,

and the Judge has found the fact in plaintiff's favour: *Hardingham v. Allen*, 5 C. B. 793. This leaves but the one question to be disposed of: Can there be distress for statute labour commutation, when the amount for which several lots are liable is put down in gross against them all, instead of being rated and charged against every separate lot and parcel, as required under sec. 109 of the Assessment Act? The provision of sec. 109 as to special apportionment of the statute labour tax is imperative, and not merely directory. In the case of resident and non-resident, the words of the section are: "The statute labour shall be rated and charged against every separate lot or parcel, according to its assessed value." *Love v. Webster*, 26 O. R. 453, followed. In the event of there being no distress upon any of plaintiff's lots, a sale of them, or any of them, could not be validly made for this unapportioned tax, or for any part of it where not apportioned on the roll.

If the taxes which plaintiff admits to be due, for which he tendered \$68.40, have not been paid, the township should not lose them, and, as the township has indemnified the collector, this amount should be set off, if defendants wish it, against plaintiff's costs. If there should be any difficulty about the lien for costs of plaintiff's solicitor, an application may be made.

Appeal dismissed with costs.

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No. 28.

FALCONBRIDGE, C.J.

JULY 13TH, 1903.

TRIAL.

ANTHONY v. CUMMINGS.

Gift—Deposit in Bank—Parent and Child—Improvidence.

Action by a mother against her son to recover \$1,000 which was left to the mother by her deceased husband, and deposited by herself and her son in a bank to the joint credit of both.

L. F. Heyd, K.C., for plaintiff.

J. Harley, K.C., for defendant.

FALCONBRIDGE, C.J.—Plaintiff did not intend to make and never did in fact make a gift inter vivos of the fund in question. She did not understand the full consequence and effect of the mode in which the deposit was made. Her capacity to grasp the situation was and is limited, and she did not grasp it, and the transaction was improvident and ill-advised. . . . Judgment for plaintiff as prayed, but without costs, defendant's conduct not having been fraudulent.

OSLER, J.A.

JULY 15TH, 1903.

TRIAL.

CLERGUE v. MCKAY.

Specific Performance—Contract for Sale of Land—Authority to Agent to Sell—Refusal to Carry out Agent's Bargain—Offer to Sell to Agent for Undisclosed Principal—Oral Acceptance by Agent—Completed Contract—Statute of Frauds—Conveyance of Land by Vendor before Action—Bona Fide Purchaser for Value without Notice—Registration of Conveyance—Intervening Registration of Certificate of Lis Pendens—Action—Parties—Damages.

Action for specific performance of an agreement to sell defendant Preston's undivided two-thirds interest in certain property in the town of Sault Ste. Marie for \$1,200.

The action came on for trial at Sault Ste. Marie in November, 1902. The only persons then defendants were Annie McKay and Thaddeus D. Preston. The action was dismissed as against the former, and in the course of the trial it appeared that, after the making of the contract sought to be enforced, and before action, defendant had conveyed the land in question to one W. B. Heath. The plaintiff had registered a certificate of *lis pendens* two or three days before the registration of Heath's deed. Leave was given to add Heath as a party: see ante 50; he was added, and the pleadings were amended.

The trial was resumed at Toronto on the 10th July, 1903, on the amended record.

J. M. Clark, K.C., and N. Simpson, Sault Ste. Marie, for plaintiff.

G. H. Watson, K.C., and W. H. Hearst, Sault Ste. Marie, for defendants.

OSLER, J.A.— . . . The title of defendant Preston to the property at the date of the alleged agreement was not in dispute, and both defendants were then and still are residents of the city of Iona, in the State of Michigan.

Plaintiff proved (1) an instrument in writing dated 1st November, 1899, signed by defendant Preston, authorizing Mr. John McKay to sell and dispose of his undivided two-thirds share or interest in the lots in question for \$750 or such greater price and on such terms as he might think proper, and to execute such agreements for sale as might be requisite. (2) A formal power of attorney under seal, dated 21st November, 1899, from defendant Preston to McKay, authorizing the latter to sell the land at such price and on such terms as he might think proper, and to execute such deeds and conveyances thereof as might be necessary. . .

Soon after becoming possessed of those powers, interviews and discussions took place between McKay and one W. H. Plummer as to the sale of the lots. According to the evidence of the latter, McKay asked him if he could make a sale. Plummer said he thought he could make one for \$1,200, but wished to know whether there was any commission in it for him. McKay said there might be \$50, which would come out of the purchase money, and McKay, who was a member of the firm of Hearst & McKay, defendant Preston's solicitors, then wrote and handed to Plummer a letter addressed to Plummer, dated 13th December, 1899, as follows: "A client of ours who owns an undivided two-thirds interest in water lots 21 and 22, South Bay street, is willing to sell such interest for \$1,200 cash, which is slightly

ove the rate of \$8 per foot frontage. Kindly advise us if
a wish to purchase at that price. Yours truly, Hearst &
Kay."

Plummer was not at this time agent for any one to purchase, but he took the letter to a Mr. Rowland, the plaintiff's general solicitor and man of business, to be submitted to plaintiff to see if he would take up the offer. . . .

About 23rd December McKay asked Plummer if there was any chance of making a sale "to him or his associates." Plummer thought the parties were not disposed to buy, and McKay on that day advised his principal that there seemed no immediate prospect of a sale. On the 31st December, however, Clergue told Rowland to authorize Plummer to accept the offer, and Plummer accordingly did so within the next two or three days, orally and, as it would seem, in his own name, at all events without disclosing that plaintiff was the purchaser. It was, however, quite understood between McKay and Plummer and Rowland, with the latter of whom plaintiff came into communication immediately after the acceptance of the offer, that the deed was to be made to Plummer, and McKay was evidently satisfied to accept him as the purchaser, whether he was acting in the interest of other persons or not.

Several interviews took place between McKay and Rowland as to carrying out the sale, in one of which McKay told him he would prepare the deed and send it to defendant Preston for execution. On the 12th January, 1900, McKay accordingly did so, Plummer being named in the deed as the purchaser, with the following letter written by him in the name of his firm:—"T. B. Preston, Esq., Iona, Mich.—Dear Sir: We have arranged to sell the two-thirds interest in the latter lots to W. H. Plummer for \$1,200. This, we consider, is an extra good sale. We will, of course, have to allow him \$50 on account of commission, and, in addition to the \$50, we shall have to charge you our commission of \$60 on the sale. . . . Kindly have deed executed and return to us at once, and remain, yours truly, Hearst & McKay."

Shortly afterwards defendant Preston wrote McKay regarding to carry out the agreement. . . .

By deed of 18th May defendant Preston, without further communication with McKay, conveyed his interest in the property to defendant Heath, for the expressed consideration of \$1,000, of which \$900 was paid on the 19th May, and a promissory note given for the balance, which was paid in full. . . . The affidavit of execution of this deed purports to be sworn on the 29th May, 1900, on which day, and in ignorance of its execution, the writ of summons in this action was issued and certificate of lis pendens registered at 3 o'clock p.m. The

deed to Heath was duly registered on the 1st June at 3 p.m. Nearly twelve months elapsed before the writ and statement of claim were served on defendant Preston and the action proceeded with. Plaintiff had long before this become aware of the conveyance to Heath, but the action was brought down to trial in November, 1902, without his having been made a party.

For defendants it was contended that if the letter of 13th December, 1899, was an offer to sell, which they denied, it was an offer to sell to Plummer, and not to plaintiff, inasmuch as Plummer was not then plaintiff's agent; that, if it was an offer, it was not followed up by a binding acceptance within a reasonable time; that any bargain made with Plummer after he had become plaintiff's agent was oral only, and that the agent's letter of 12th January, 1900, was not evidence of a binding contract; that Plummer was not a purchaser, but was only an agent of the owner to sell, as evidenced by the promise to pay him a commission; that defendant Heath being a bona fide purchaser and having obtained a conveyance before the commencement of the action, specific performance could not be enforced against him; and lastly that the delay in carrying on the proceedings against defendant Preston and in commencing them against Heath was, in any case, such as to disentitle plaintiff to relief. . . .

I am, in the first place, of opinion that the letter of 13th December is in terms an offer to sell, on the acceptance of which by Plummer a valid contract of sale would have been constituted between Plummer and plaintiff. It is more than a mere statement that the writer is willing to receive an offer. . . . *Harvey v. Facey*, [1893] A. C. 552, and *Johnston v. Rogers*, 30 O. R. 150, distinguished. . . . Here defendant says (in effect): "I am willing to sell at such a price. Will you, W. H. Plummer, buy?" And the person to whom the letter is addressed says, "I will." If the requisites of the statute are complied with, there is a valid contract.

Then is there such a contract between plaintiff and defendant Preston? I think there is. McKay was the latter's agent to sell, armed with very comprehensive powers. Plummer may not have been plaintiff's agent to buy when he received the offer from McKay, but in the evidence I find that the latter's belief or expectation (so far as that may be material) was that either he would find some person other than himself who would buy, or that he, or he and others to be associated with him, would do so at the price named, less a commission or deduction of a specified sum. McKay was quite willing that Plummer should become the purchaser,

though he stipulated for this allowance, and the case would be distinguishable on this ground from *Livingston v. [1901] A. C. 327*, if Plummer were himself the plaintiff requiring specific performance. . . . When Plummer on 1st or 2nd January, 1900, accepted the offer orally, it was accepted by McKay as an existing offer, and Plummer was undoubtedly Clergue's agent to accept it, though he did so in his own name.

It may be held, too, upon the evidence, leaving the written offer, as such, out of consideration, that there was then an offer and acceptance on the same terms as those mentioned in the writing, and the letter of the 12th January, 1900, is a note of it in writing amply sufficient to satisfy the court, shewing, as it does, the land, the price, and the name of the purchaser—whether stated in terms to be the agent of the plaintiff or not, is immaterial, because he was so in fact—it is signed by the agent of the owner, whose authority was still in full force and effect. *Mundy v. Osprey*, 13 Ch. D. 355, *Smith v. Webster*, 3 Ch. D. 49. and *McClung v. McCracken*, 3 O. R. 596, distinguished. . . .

The next question is, whether plaintiff is entitled to specific performance of this contract as against defendant Heath, and this depends upon whether the latter was a bona fide purchaser without notice of the contract and the effect to be attributed to the registration of the certificate of *lis pendens* prior to the registration of the conveyance. . . . Upon the evidence, I have no hesitation in finding as a fact that Heath was a bona fide purchaser without notice of plaintiff's contract, for the full consideration expressed in his deed. The deed was executed and a considerable part of the purchase money paid (though this seems not material—*R. S. O.* 1897, sec. 36) at least ten days before the action was brought. Heath's title as a purchaser *ante litem* was then complete, and, although he had not registered his deed, there was no room for the application of sec. 97 of the *Judicature Act*, which provides that the instituting of an action in which any title or interest in land is brought in question shall not be deemed notice of the action to any person not being a party thereto until a certificate in the form prescribed . . . has been registered. The object of this provision is to limit and control the application of the former doctrine as to the effect of *lis pendens*, which, as stated in *Bellamy v. Sabine*, 1 G. & J. 566, cited in *Price v. Price*, 35 Ch. D. 297, broadly is, that *pendente lite* no one could alienate the property in dispute so as to affect his opponent, the foundation on which the doctrine rested being the impossibility of bringing an action or suit to a successful termination if alienation pen-

dente lite was permitted to prevail. The mere existence of the action is no longer notice of the lis. That is to be given by the registration of the prescribed certificate. But the object and effect of the notice so given are the same as before, namely, to prevent alienation pendente lite. Heath was a purchaser ante litem, and as such was clearly a necessary party to the action when it was brought or as soon as plaintiff became aware of his deed. If he had been a party, he would have had all the notice that the registration of a certificate of lis pendens could have given him, but no one could have successfully contended that he was not still entitled to register his deed, or that, if he omitted to do so, his defence of a bona fide purchase for value without notice would have been affected thereby. . . . Sanderson v. Burdett, 16 Gr. 119, 127, followed. Millar v. Smith, 23 C. P. 47, distinguished. . . .

Even if, however, I had taken a different view of the effect of the registration of the lis pendens, I should have been of opinion that the great and unexplained delay in proceeding with the action against Heath would have disentitled plaintiff to relief. He was aware of Heath's deed some time . . . before the 23rd May, 1901, when the writ and statement of claim against defendant Preston were served . . . nearly a year after the registration of the lis pendens. Before this, defendant Heath had paid the whole of his purchase money without notice, in fact; but the case was brought to trial in his absence, and no proceedings were taken against him until 31st March, 1903, when he was made a party and the pleadings amended. . . . The property was of a speculative nature, the registration of the lis pendens prevented its further alienation, and plaintiff was doubly bound to prosecute the action with diligence and bring it to a speedy result: Smith v. Hughes, 5 O. L. R. 238, 244, and cases there referred to; Fry on Specific Performance, 4th ed., pp. 475, 478; Finnegan v. Keenan, 7 P. R. 386; Somerville v. Kerr, 2 Ch. Ch. 154.

As against defendant Heath, therefore, I dismiss the action with costs.

As against Preston there cannot, of course, be specific performance, but plaintiff contends that damages ought to be awarded to him for the loss of his bargain. . . . Bain v. Fothergill, L. R. 7 H. L. 158, distinguished. . . . The defendant Preston knew, as appears by his letter of 20th January, 1901, that a contract had been closed by his agent McKay with Plummer, but, in consequence of the report of one Taylor as to the value of the land, bearing the same date as

McKay's letter announcing the contract, he seems to have determined to disregard it and to hold for a higher price, which he obtained by the subsequent dealing with defendant Heath. He has, in bad faith and for his own advantage, broken his contract and prevented himself from carrying it out. Day v. Singleton, [1899] 2 Ch. 320, is . . . clear authority that, under such circumstances, he may be ordered to pay damages for the breach. In assessing such damages, as I do, at \$500, I am awarding a much smaller amount than the evidence would warrant me in giving. . . . Judgment for plaintiff with costs for the above amount against defendant Preston. See also Jones v. Gardiner, [1902] 1 Ch. 191; Ont. Jud. Act, sec. 57, sub-sec. 13.

HODGINS, MASTER ~~IN~~ ORDINARY.

JULY 16TH, 1903.

CHAMBERS.

HENDERSON v. BUTTON.

Infant—Suing without Next Friend—Leave to Amend—Costs—Plaintiff's Solicitor.

Motion by defendants to set aside the writ of summons and the copy and service thereof, with costs to be paid by plaintiff's solicitor, on the ground that at the date of the issue of the writ plaintiff was an infant, and that it was issued in his name without a next friend. The action was brought to recover damages for injury to plaintiff at defendants' factory from defective and unguarded machinery, and general negligence of defendants. Plaintiff's solicitor admitted the irregularity, and asked leave to amend by naming a next friend.

G. H. Kilmer, for defendants.

E. G. Long, for plaintiff.

THE MASTER held, following Flight v. Bolland, 4 Russ. 298, that the amendment should be allowed. See also Macpherson on Infants, p. 364; Anon. v. Brocklebank, 6 Ch. D. 358. Order made allowing plaintiff to amend, on payment of all costs incurred by defendants up to and inclusive of the order. The amendment to be made within ten days from the date of the order, and in default of its being so made, action to be dismissed with costs to be paid by plaintiff's solicitor. See Gislinger v. Gibbs, [1897] 1 Ch. 474.

JULY 16TH, 1903.

DIVISIONAL COURT.

RUSHTON v. GRAND TRUNK R. W. CO.

Evidence—Depositions of Witnesses—Use on Motion for New Trial—Contradicting Evidence Given at Trial—Appointment for Examination—Setting aside—Divisional Court—Jurisdiction—Reference of Motion by Master in Chambers—Agreement of Parties.

Motion by defendants (referred by Master in Chambers to a Divisional Court) to set aside an appointment and subpoena issued by plaintiff for the examination of three men who had given evidence at the trial, with the intention of using their depositions upon a motion made by plaintiff for a new trial upon the ground of surprise. The plaintiff's solicitor had made an affidavit stating that certain witnesses called for plaintiff had withheld evidence which they could have given in support of plaintiff's case at the trial, and that they were willing to give such evidence upon a new trial.

W. R. Riddell, K.C., for defendants.

Shirley Denison, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that no power is given by the Rules to the Master in Chambers to refer questions before him to a Divisional Court for determination, but that the Court might properly hear a motion if both parties agreed that it should do so, and in this case no objection was made. In a proper case the depositions of witnesses whose evidence is required for the purpose of applications pending before a Divisional Court may be taken under Rule 491, where such evidence is properly receivable and cannot be obtained upon affidavit. In the present case, however, the avowed and only object of the proposed examinations was to obtain from certain persons who were examined as witnesses for plaintiff at the trial statements that the evidence they gave at the trial was not in fact true, and that certain statements made by them before the trial to plaintiff's solicitor were true. It would be dangerous to permit evidence of this nature to be received upon a motion for a new trial; neither affidavits nor depositions should be received for the purpose of establishing that the deponents had wilfully concealed or misrepresented the truth when giving their evidence upon oath at a former trial: *Phillips v. Hatfield*, 8 Dowl. P. C. 882; *Harrison v. Harrison*, 9 Price 89. Order made as asked by defendants with costs here and below.

FALCONBRIDGE, C.J.

JULY 17TH, 1903.

TRIAL.

CONNELL v. JEWELL.

Vendor and Purchaser—Contract for Sale of Land—Delay—Action for Specific Performance—Interest—Costs.

Action by vendor for specific performance of contract, and without a jury at Goderich.

E. Campion, K.C., for plaintiff.

W. Proudfoot, K.C., for defendant Jewell.

M. O. Johnston, Goderich, for defendant Boyle.

FALCONBRIDGE, C.J.—The parties all admitted that the agreement ought to be specifically performed, and the sole dispute was as to who was responsible for the delay. The question of fact to be tried was on defendant Jewell's allegation that plaintiff should accept as cash Jewell's note \$200. This I find against Jewell, holding that he has not satisfied the burthen of proof which lies on him to establish that arrangement. Defendants will have to pay the interest on the unpaid balance of purchase money. This litigation might easily have been avoided by the exercise of a little care and discretion. As to this, one party is no more to blame than another. Declaration that the contract ought to be specifically performed. Costs to plaintiff against defendant Jewell only up to and inclusive of filing of statement of claim. No order as to costs or otherwise as between the defendants. If any inquiry or reference is necessary, the parties may apply in Chambers touching costs of such inquiry, and generally.

MAHON, J.

JULY 18TH, 1903.

WEEKLY COURT.

CRESSWELL v. HYTTENRAUCH.

The Union—Exclusion of Member—Interim Injunction—Illegal Organization—Speedy Trial—Terms.

Motion by plaintiff to continue injunction restraining defendants from excluding plaintiff from the union or federation of musicians by the device of surrendering their charter and taking out a new charter, leaving plaintiff and the members of his orchestra out of the new organization.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for defendants.

MACMAHON, J.—It was urged upon the argument that the London Musical Protective Association was an illegal organization, and, plaintiff being a member thereof, the Court would not assist him by enforcing an agreement made by him with the association, and that the injunction should be dissolved. Some of the rules of the association smack of “trades unionism” and may make it an illegal organization: see *Rigby v. Connel*, 14 Ch. D. 482; *Parker v. Toronto Musical Protective Association*, 32 O. R. 305; *Chamberlain’s Wharf v. Smith*, [1900] 2 Ch. 605; *Old v. Robson*, 59 L. J. M. C. 41; *Cullen v. Elwin*, 19 T. L. R. 426. I express no opinion, however, on this point, it not being desirable to provoke an appeal when all the questions in issue can be disposed of at the trial. Injunction continued till the trial. Pleadings to be delivered during vacation. Statement of claim to be filed and served by 27th instant, and record entered forthwith after close of pleadings so that the trial may take place at the next non-jury sittings at Toronto during the first or second week of the sittings. Any further examinations for discovery to be had during vacation. Costs of motion to be costs in the cause.

MACMAHON, J.

JULY 18TH, 1903.

WEEKLY COURT.

SMALL v. HYTTENRAUCH.

Trade Union—Interference with Servants of Plaintiff—Interim Injunction—Speedy Trial—Terms.

Motion by plaintiff, the lessee of an opera house at London, Ontario, to continue injunction restraining defendants, who are members of the American Federation of Musicians, from doing any acts to withdraw musicians from the orchestra at the plaintiff’s house, and from interfering with the musicians employed in such orchestra.

J. H. Moss, for plaintiff.

J. G. O’Donoghue, for defendants.

MACMAHON, J., followed the decision of the Chancellor in *Small v. American Federation of Musicians*, 2 O. W. R. 33, and directed that the injunction be continued to the trial. The terms of the order to be the same as in the preceding case.

BRITTON, J.

JULY 18TH, 1903.

TRIAL.

FERGUSON v. McNULTY.

Limitation of Actions—Agreement to Purchase Land—Purchaser Deliberately Taking Possession of Wrong Lot—Subsequent Conveyance of Right Lot—Acquisition of Title—Ejectment—Nonsuit—No Bar to Future Action—Costs.

An action of ejectment, tried at North Bay.

J. M. MacNamara, North Bay, for plaintiff.

A. G. Browning, North Bay, for defendants.

BRITTON, J.—The plaintiff and the defendant Catharine McNulty on 6th March, 1889, entered into an agreement for the sale by plaintiff to that defendant of a lot of land, in the township of Widdifield, on the outskirts of North Bay, about one-eighth of an acre, for \$125, payable \$20 down and the balance in monthly instalments. The lot is described in the agreement by metes and bounds. A plan was made of this property on the 29th August, 1889, and the land in the agreement is lot 49 on this plan, while the land which defendants were in possession of . . . and for which this action is brought, is what is laid down on this plan as lots 51 and 52. The defendants did not until recently go into possession of the claim lot 49, but they did take possession in 1889 of lots 51 and 52. The defendant Catharine McNulty says she knew, when taking possession of 51 and 52, that it was not the land mentioned in the agreement. She refused to take 49, and she did take 51 and 52 and arranged to build upon it. . . . The house was built there. No change was made in the agreement. Defendants did not go into possession of 49. Payments were irregularly made upon the agreement, and so the matter stood until 1895, when plaintiff called upon defendant Catharine McNulty. She was living in the house. . . . The plaintiff unfortunately did not bring the matter to a point. He says defendants were notified several times to give up possession. He expected that defendants would pay for this property and get a deed of it and abandon lot 49. Plaintiff knew in 1895 that defendants were upon this property which they had not purchased, and he did nothing in reference to their possession of it until the commencement of this action. Meantime defendants, with the intention, as it appears to me, of getting the three lots for the price agreed upon for lot 49, continued to pay until the balance was paid in full, and demanded a conveyance, which plaintiff gave, of lot 49, without taking any steps to correct the mistake, or to

compel defendants to give up possession of or pay for lots 51 and 52. . . .

In short there is nothing before me but the fact that defendants have had actual visible possession of the land since . . . 1889, more than ten years before the commencement of this action, which is, I think, barred by the Statute of Limitations. I have not before me any facts upon which I can give to plaintiff any relief. It is not a case where there have been improvements made under mistake of title. The defendants both knew, when they took possession of these lots 51 and 52, that they had no title to them. . . The possession was "open, visible, and exclusive of the true owner." The possession has been continuous. . . . The visit of plaintiff in 1895 cannot be said, upon the evidence, to have been an entry by him under assertion of right or in any such way as to stop the running of the statute against him. The statements made by Catharine McNulty were only verbal. There were no such admissions of plaintiff's title or of his position or possession as would create a tenancy of any kind. What took place at that interview does not bring the case within the decision of *Smith v. Keown*, 46 U. C. R. 163. See *McCowan v. Armstrong*, 3 O. L. R. 100.

There has been no request by plaintiff for any reformation of the agreement; no admission by defendants that lots 51 and 52 were in substitution for lot 49; no offer to pay for 51 and 52. . . . The payments were all due on the agreement on 6th April, 1891, at latest, and therefore more than ten years before this action was commenced. . . .

I do not know that there is any possible evidence that would assist plaintiff. If any such evidence can be procured, the judgment now pronounced should not bar another action by plaintiff; and so I direct judgment of nonsuit, and that it may not be pleaded in bar to a fresh action for the same cause: Rule 779.

Defendants have got for nothing land that belonged to plaintiff; they should not get the costs.

Nonsuit without costs.

JULY 18TH, 1903.

DIVISIONAL COURT.

SMALL v. HYTTENRAUCH.

Parties—Representation of Classes—Rule 200—Members of Unincorporated Voluntary Association—Trades Unions—Local Organization—Members of Executive Committee—Ordinary Members Specially Interested—General Federation—Representation by President.

Appeal by plaintiff from order of FERGUSON, J., in Chambers (ante 447) dismissing application by plaintiff for an

order authorizing and directing the seven individual defendants (excluding defendant Weber) to defend the action on behalf of the London Musical Protective Association, and authorizing and directing them and Weber to defend the action on behalf of the American Federation of Musicians, and directing that all the members of the association and federation should be bound by any judgment that might be pronounced in the action in the same manner and to the same extent as if they were personally made parties to the action, and also amending the writ of summons and proceedings by setting forth that all the eight individual defendants are sued as well on their own behalf as on behalf of all the other members of the American Federation of Musicians.

There were four classes of defendants:—(1) Seven persons who were officers and leading members of the London Musical Protective Association, which was the local branch of the American Federation of Musicians, these seven being sued on behalf of themselves and all other members of the London Musical Protective Association. (2) The American Federation of Musicians. (3) The London Musical Protective Association. (4) Joseph Weber, the president of the federation, a resident of the State of Ohio.

The plaintiff was the lessee of an opera house in London, Ontario. One Evans had a contract with plaintiff during the season of 1901-2 to supply an orchestra for each performance at the opera house, at a fixed price. He and all the members of his orchestra were members of the London Musical Protective Association, and, as such, were also members of the American Federation of Musicians, which was the central organization of all the local musical protective associations in Canada and the United States.

After the season of 1901-2 the local association agreed to raise its rates, and Evans and his orchestra refused to re-engage with plaintiff at the old rate, but offered to re-engage at \$13.50 per night, which was the new rate. Thereupon plaintiff entered into an agreement in writing with one Cresswell, also a member of the local association, to engage him and his orchestra for the season of 1902-3, at the rate of \$13.50 per night, being the same rate as that at which Evans and his orchestra had offered to contract, and the rate authorized by the local union. Cresswell and his orchestra began to play at plaintiff's house, but some complaint was made in the interest of Evans's orchestra, and defendant Weber, as president of the federation, decided that the local organization should protect Evans by demanding that the members should not play for plaintiff until the wrong done Evans, for adhering to the price list, should be righted. This decision was made known to Cresswell, who refrained from playing for

three or four performances. After some discussion and hesitation, defendant Weber ordered one Carey, the executive officer of the 9th district of the federation, "to call out the Cresswell orchestra and to inform the members that no member of the American Federation of Labour shall play in Mr. Small's London theatre until Mr. Evans is reinstated."

On 5th December, 1902, an *ex parte* injunction was obtained by plaintiff, in the present action, restraining defendants from persuading or ordering Cresswell and his orchestra not to perform at plaintiff's house, the action being for an injunction restraining defendants from doing any act to induce Cresswell and his orchestra to break their contract with plaintiff, and to restrain them from conspiring together for that purpose, and for damages. After the action was begun, the charter of the local association was, by direction of Weber, returned to the federation, and steps taken to wind up the association and form a new local association, with the object, it was said, of excluding Cresswell and the members of his orchestra.

The appeal from the order of FERGUSON, J., refusing to direct representation, etc., was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for the individual defendants except Weber.

No one for the other parties.

STREET, J.—Our Rule 200 provides that "in an action where there are numerous parties having the same interest, one or more of such parties may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all parties so interested. . . . The meaning attached to the Rule . . . has been . . . that the word "parties" is equivalent to "persons:" *Smith v. Doyle*, 4 A. R. 471.

Temperton v. Russell, [1893] 1 Q. B. 435, *Duke of Bedford v. Ellis*, [1901] A. C. 1, and *Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants*, ib. 426, referred to. . . . It has been decided by a Divisional Court here in *Metallic Roofing Co. v. Local Union No. 30*, 5 O. L. R. 424, ante 183, that the difference between the status of a trades union here and in England is such as to render the *Taff Vale* case inapplicable here, and therefore that organizations such as the London Musical Protective Association cannot be sued under their collective name. It is evident, however, from the affidavits and examinations before us, that a number

persons, seven of whom are defendants in the present action, are bound together by a set of rules by which they are in the habit of considering themselves governed; that they annually elect officers, who are an executive committee or board to act on behalf of the whole body of members; that they have a treasurer, to whom they pay regular contributions for carrying out the purposes of the association; and that they hold meetings, at which the majority of votes cast by the members present determines the action of the executive committee on behalf of the whole body. . . . The persons made defendants as representing the London Musical Protective Association are the president, Wittenrauch, and three other members of the executive committee, one of whom is the treasurer and was the acting secretary at the time the charter was returned, and three other members who appear to have taken a specially active part in the matters in question or to be specially interested in it. As far as the local body is concerned, which does not appear to comprise more than 60 persons, I am of opinion that the persons selected to represent it are properly qualified to do so. They form, in fact, as I understand the rules of the association, the majority of the persons elected by the members of the association to represent them as an executive committee, along with other members specially interested. I think it would have been better to have all the members of the executive committee joined as defendants, but there may have been some difficulty in ascertaining their names; and the objection made by the defendants upon the argument was not based upon this ground, but upon the broad principle that no representation was permissible in a case of this nature.

I am of opinion, therefore, that the case is brought within Article 200 by the fact that the members of the London Musical Protective Association are a numerous body of persons who, with the exception of Cresswell and his orchestra, are acting under the same interest, through their executive committee, viz., to compel Cresswell to break his contract with plaintiff, in other words that what they understand to be the principles of their organization may be sustained.

It is further asked, however, that these same defendants and the defendant Weber may be directed to defend on behalf of the American Federation of Musicians, which is the whole body in Canada and the United States, made up of the numerous local organizations, and comprising, it is said, many thousands of members both here and all over the United States. It is essentially a foreign body, having its headquarters at Cincinnati, Ohio, where its executive committee sits, although the members of its branches in Canada are de facto members of the federation. The persons who form

the executive committee are few in number, and are the only persons whose acts affect local organizations in Canada, and in a proper case they might be made parties, if it should become necessary. But I do not think that a case has been made out justifying us in treating defendant Weber, who is the president, as sufficiently representing the whole of the local organizations, wherever situate, nor do I see the necessity for our making all the members of these associations parties to this action, which is what is asked for. In my opinion, therefore, this part of the order asked for should be refused, and only that part of it should be granted which directs that the individual defendants other than Weber may be sued and authorized to defend on behalf of all the members of the London Musical Protective Association other than Cresswell and the members of his orchestra (naming them).

The order of my brother Ferguson should, therefore, in my opinion, be varied to the extent necessary to carry these views into effect; and, as the success has been divided, there should be no costs of the motion to him or of the present appeal.

FALCONBRIDGE, C.J., and BRITTON, J., concurred.

JULY 18TH, 1903.

CRESSWELL v. HYTTENRAUCH.

Parties—Representation of Classes—Rule 200—Members of Unincorporated Voluntary Associations—Trades Unions—Local Organization—Members of Executive Committee—Ordinary Members Specially Interested—General Federation—Representation by President—Domestic Tribunal.

Appeal by plaintiff from order of MACLAREN, J.A., in Chambers (ante 447) dismissing application by plaintiff for an order for representation of parties similar to that applied for in *Small v. Hyttenrauch*, supra.

This action was brought to restrain defendants from taking any further steps to dissolve or wind up the London Musical Protective Association, and from proceeding or conspiring together, in fraud of plaintiff's rights, to unlawfully exclude him from membership in that association and in the American Federation of Musicians. Plaintiff was a member of the local association, and by reason of such membership he was also a member of the American Federation of Musicians. He refused to break a contract to play for Small at the London opera house for the season of 1902-3, although ordered

to do so by the federation. He alleged that, to exclude him from membership, the local body went through the form of dissolving itself, with the object of forming a new body from which he should be excluded, and so deprived of his membership in the federation.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for the individual defendants except Joseph Weber.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—It was objected by defendants that the question at issue between plaintiff and defendants is one which must be determined by the tribunal appointed by the rules of the association, and that it is not the habit of the Courts to interfere until recourse has been had to them. It may very possibly appear, when the parties are brought before the Court, that this is the case, but to determine that question now would be to try the case, which we should not do upon a mere question of adding parties. . . .

The same order should be made as in *Small v. Hyttenrauch*, except that defendants in this action should be sued as representing the members of the London Musical Protective Association other than the plaintiff, Cresswell; and there should be no costs here or below.

JULY 18TH, 1903.

DIVISIONAL COURT.

MCGILLIVRAY v. MUIR.

Justice of the Peace—Penalty—Action for—Wilfully Receiving Larger Fee than Authorized—Amendment—Notice of Action—Fee Received in Case where none Authorized—Jurisdiction—Recovery—of Fee—Costs.

Appeal by defendant from judgment of junior Judge of County Court of Bruce in favour of plaintiff in a *qui tam* action for a penalty.

T. Dixon, Walkerton, for defendant.

J. Idington, K.C., for plaintiffs.

The judgment of the Court (FERGUSON, J., MACMAHON, J.) was delivered by

MACMAHON, J.—Action under sec. 3 of R. S. O. ch. 95, to recover from the defendant the penalty of \$80 provided by the Act for receiving a larger amount of fees as a justice of the peace than he was entitled to, and for the amount of fees so received, being \$1.80. The \$1.80 had been paid into Court and not accepted by the plaintiffs.

An information had been laid by the plaintiff Vair, on behalf of his co-plaintiff, Mrs. McGillivray, before the defendant, for an indictable offence ~~under secs. 210 (2) and 215~~ of the Criminal Code, over which the magistrate had not summary jurisdiction, and, therefore, was not entitled to any fees whatever.

There is a schedule and table of fees to ch. 95, R. S. O., the first section of which provides that "The fees mentioned in the schedule to this Act, and no others, shall be and constitute the fees to be taken by justices of the peace, or by their clerks, for the duties and services therein mentioned; and shall be the costs to be charged in summary proceedings or convictions before the justice, where no other fees are expressly prescribed."

The Criminal Code gives a schedule of fees to be taken by justices in proceedings under the Summary Convictions part (LVIII.), containing items of fees exactly similar to those in the schedule to the Ontario Act. And sec. 871 of the Code provides that "The fees mentioned in the following tariff, and no others, shall be and constitute the fees to be taken on proceedings before justices on proceedings under this part."

The 3rd section of the Ontario Act provides that "Every justice wilfully receiving a larger amount of fees than by law authorized to be received shall forfeit and pay the sum of \$80, together with full costs of suit, to be recovered by any person suing for the same . . . one moiety of which shall be paid to the party suing, and the other moiety . . . for the uses of the Province."

The wording in the Code is the same, and the penalty is the same, the only difference being that under the Dominion Act one moiety is payable for the public uses of Canada.

In the statement of claim (paragraphs 6 and 9) the allegation is that "The defendant . . . wrongfully, illegally, and maliciously, and without reasonable or probable cause, demanded from the plaintiff Louisa McGillivray the sum of \$1.80," etc.

Counsel for the defendant, at the opening of the trial, urged that the action was improperly brought under the Ontario statute, the offence charged in the information taken before the defendant being for a violation of the Criminal Code, and that sec. 902, sub-sec. 6, of the Criminal Code governed.

Plaintiffs' counsel then applied to amend the 9th paragraph of the statement of claim, by striking out the words "maliciously and without reasonable or probable cause," and substituting the word "wilfully" therefor, which amendment was allowed by the trial Judge. And after the trial he allowed an amendment to the record (asked for at the trial) by permitting the plaintiffs to add a paragraph to the statement of claim setting up in the alternative that the defendant was liable to pay the penalty imposed by sub-sec. 6 of sec. 902 of the Criminal Code.

One ground of the appeal is, "that the notice of action and the pleadings not having set out the defendant 'wilfully' received the fees mentioned, no amendment should have been allowed to the 9th paragraph of the statement of claim, as it was permitting a new case to be made out not covered by the notice."

The notice—if a notice in this case was necessary—is for the purpose of advising the defendant what the alleged cause of action is, viz., that he had demanded and received fees not allowed by law. The plaintiffs in order to recover the penalty must prove that the fees were received not erroneously under a misapprehension of fact, but "wilfully," which means "purposely," "intentionally," knowing he had no right to receive the fees: *Hutchinson v. Manchester, etc., R. W. Co.*, 15 M. & W. 344; *Re Young and Harston's Contract*, 31 Ch. D at p. 174; *Wilson v. Manes*, 28 O. R. at p. 433.

Whether he received it "wilfully" or not is a question of fact to be decided by the tribunal trying the action. If the amendment would substitute a different transaction from that alleged, it ought not to be made: *Brashier v. Jackson*, 6 M. & W. 549. But, if the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed: *Cooks v. Stratford*, 13 M. & W. 379.

The defendant would require the same evidence to meet the unamended record as he would after it had been amended.

The amendments were, I consider, properly made.

The fee received was not paid voluntarily, as it was shewn that the amount was demanded from Vair, who took

a receipt therefor; and the learned County Court Judge found that the defendant, who, according to the evidence, had acted as a justice of the peace for twenty-five years, intentionally took the fee of \$1.80, knowing he had no right to do so. There is ample evidence to sustain the finding.

The ground principally relied upon in support of the appeal was, that the Act only applies to cases where a justice acting under the Summary Convictions Act wilfully receives a larger amount of fees than by the tariff he was authorized to receive. And as the fee he charged and received was in connection with an indictable offence for which no fee is authorized either by the tariff of the Province or of the Dominion, no action could be maintained against him for the penalty.

In *Bowman v. Blyth*, 7 E. & B. 26, the action was brought under 26 Geo. II. ch. 14, sec. 2, which provides that where a clerk to a justice demanded or received any other or greater fee than was authorized by the table of fees to be taken by clerks of justices of the peace, to be settled by the justices at their general quarter sessions of the peace, which table of fees being approved by the next general sessions, etc., he was liable to a penalty of £20. In that case, a table of fees has been prepared by the quarter sessions, but was not approved, as required by the statute, and the Court of Queen's Bench held that, as it had not been approved, no tariff of fees was in force, and therefore no action would lie against a clerk of the justices for the penalty for taking fees contrary to it.

Our Acts already referred to authorize the taking by the justices of the fees mentioned therein solely in cases where the magistrate has jurisdiction under the Acts relating to summary convictions, and it is for an infraction of either of these Acts by wilfully taking a larger fee in such cases that he may be penalized.

There is no Act of Parliament authorizing the taking of a fee on a charge made for an indictable offence, which was claimed and taken by the defendant in this case, and he cannot be sued for a penalty, for none is attached. That is the effect of *Bowman v. Blyth*, 7 E. & B. 26.

The defendant might have been indicted for extortion under sec. 905 of the Criminal Code. See *Regina v. Tisdale*, 20 U. C. R. 272.

The appeal must be allowed, and judgment directed to be entered for the defendant with costs, except as to the sum of \$1.80, being the amount illegally received by the defendant

and paid into Court, for which there will be judgment for the plaintiffs, with Division Court costs, to be set off against the defendant's costs, who will be entitled to issue execution for the balance.

JULY 18TH, 1903.

DIVISIONAL COURT.

RE LIQUOR LICENSE ACT.

RE COOK AND LAIRD.

Liquor License Act—Resolution of License Commissioners—Prohibition of Games of Chance on Licensed Premises—Intra Vires—Reasonableness—Conviction of Licensee—Absence of Knowledge—Form of Conviction—Fine—Distress—Imprisonment—Costs.

Appeal by the license inspector of the county of Oxford, under sec. 120 of the Liquor License Act, R. S. O. ch. 245, from an order of the Judge of the County Court of Oxford quashing the conviction of one Laird by the police magistrate for the town of Ingersoll for an infringement of a resolution of the license commissioners of the county providing that "no gambling or any game of chance whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of public entertainment . . . or on the premises." The commissioners have power by sec. 4, sub-sec. 4, of the Act, to pass resolutions for regulating the taverns and shops to be licensed. The evidence before the magistrate shewed that four persons were playing euchre for amusement in a room behind the bar of Laird's hotel, the cards used being the property of one of the players, a boarder in the hotel.

The appeal was heard by BOYD, C., FERGUSON, J., MACMAHON, J.

J. R. Cartwright, K.C., for appellant.

T. A. Gibson, Ingersoll, for Laird, the respondent.

BOYD, C.—The 3rd resolution forbids playing games of chance in the licensed premises. The keeper of the house of entertainment took his license on this condition, and is responsible if it is disregarded. That it was disregarded by playing the game of euchre in a little room back of the bar

on the afternoon of 17th January, was found by the magistrate, and beyond doubt rightly so. Euchre is a well-known game at cards, imported from the States, and is a game of chance. The cards are shuffled, cut, and dealt to the players, and the hand held by each depends entirely upon chance. Whatever adroitness may be contributed by the player, the words used by Mr. Justice Hawkins in reference to another game are doubtless aptly applied to this game of euchre: "It is a game of cards. It is a game of chance; and though, as in most other things, experience and judgment may make one player . . . more expert than another, it would be a perversion of words to say it was in any sense a game of skill." *Jenks v. Turpin*, 13 Q. B. D. at p. 524.

The conviction was quashed by the County Court Judge on the ground that the police commissioners had no jurisdiction to pass the 3rd resolution in pursuance of sec. 4 of the Act (R. S. O. ch. 245), and also because they exceeded the jurisdiction, having regard to sec. 81 of the said Act.

The power of the commissioners under sec. 4 is not restricted by sec. 81. This last section is operative as a piece of substantive law against "gambling" in places licensed to sell spirituous liquors, which attaches to all such places irrespective of the resolutions of the commissioners. But, by the resolutions they pass, the commissioners may impose further safeguards to restrict gambling in licensed premises and games of chance which savour of gambling, and are so easily merged into gambling as to escape detection under cover of lawful pastime.

That this regulation is of such a character appears to be reasonably manifest. The power to regulate given by the Legislature to the board enables them to interfere with liberty of action to the extent deemed necessary to prevent disorder and the abuse of liquor licenses—in other words, to make such provision as shall ensure the good government and orderly keeping of these licensed houses where liquor is sold. The scope of the resolution as to time and place is in line with sec. 81, but extends it to "games of chance" as well as "gambling." As said in *Regina v. Martin*, 21 A. R. 145, the defendant accepted his license on these terms, and must see to it that these terms are observed. . . . And the interference of the Court . . . is only to be undertaken when they are clearly unreasonable.

Now, it is competent for the commissioners to prohibit all card playing on the licensed premises, whether of public guests or private friends of the proprietor, for fear lest unlawful gambling should be collusively carried on in any part of the licensed premises: *Paton v. Rhymer*, 3 E. & E. 1. . .

The English cases generally require that the element of betting be attached to the playing of cards before it can be called "gaming" in the legal sense, which is synonymous with gambling. But this putting up of money or money's worth is not aimed at in the resolution in question. I note an early Virginia case of repute in which it was held that playing at cards in a tavern is unlawful gaming, whether the party bets or not: *Commonwealth v. Terry* (1817), 2 Va. Ca. 77. And in more recent American cases the law is to the same effect. Playing cards, though not for money, in a private bedroom in an inn is within a statutory prohibition against gaming in any inn: *McCalman v. The State* (1891), 96 Ala. 98; *Foster v. The State* (1887), 84 Ala. 457.

The prohibition is in a manner attached to the premises, and the landlord's ignorance does not afford an excuse. He gave orders to the bar tender not to allow playing of cards in his absence, but his brother and others violated the well-known printed regulations which are exhibited in the most public part of the premises (see resolution 10), and the agent or servant of the proprietor failed in due oversight. The knowledge of the proprietor has not been made an element of the offence, and, if games of chance are played in the premises, the landlord is responsible, because he has undertaken in getting the license that they shall be protected: *Cundy v. Leroy*, 13 Q. B. D. 210; *Collman v. Mills*, [1897] 1 Q. B. 396, per Mr. Justice Wright at p. 400.

There are some minor objections raised, e.g., that the adjudication was varied by the conviction, and that the fine could only be enforced by distress, according to resolution 12 of the commissioners. The magistrate imposed a fine of \$10, and the 8th resolution says that the fine and penalty is to be recovered and enforced with costs by summary conviction . . . and enforced by distress as provided by law. Into this resolution is to be read the provisions found in sec. 100 of the Liquor License Act, R. S. O. ch. 245, that when penalties are imposed for the infraction of a resolution of the board of license commissioners the conviction . . . may be in the form set forth in sec. 707 of the Municipal Act, R. S. O. ch. 223. Upon turning to that form it will be found that for the recovery of the penalty by distress and in default of distress imprisonment, the conviction in hand follows the statutory form sanctioned by law.

There appears to be no valid objection as to the costs allowed, \$4 20. If the inspector attends Court as prosecutor, etc., he is to be allowed certain expenses by way of costs, as provided in sec. 117. There is nothing to shew anything

wrong in the amount allowed. If it were wrong, it is clearly severable, and cannot affect the conviction as a whole.

Altogether the conviction should be upheld as valid and the judgment quashing it reversed with costs to be paid by Laird, the respondent.

FERGUSON, J.—I concur.

MACMAHON, J., referred to *Jenks v. Turpin*, 13 Q. B. D. 505; *Regina v. Ashton*, E. B. & E. 286; *Paton v. Rhymer*, 3 E. & E. 1; *Regina v. Rogier*, 2 D. & Ry. at p. 435; *Bacon's Abr. tit. "Gaming" (A)*; *Regina v. Martin*, 21 A. R. at p. 148: and concluded:

I think that the resolution which prevents the playing of a game of whist or euchre for amusement in licensed premises is not a reasonable regulation, and it is therefore one which the commissioners were not empowered to make.

In my opinion, the conviction was invalid, and the judgment of the learned County Court Judge quashing it should be affirmed with costs.

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No. 29.

JUNE 20TH, 1901.

C. A.

BALFOUR v. TORONTO R. W. CO.

Street Railways—Negligence—Car Running backwards—Jury—Answers to Questions.

The plaintiff was injured by a waggon in which he was being driven being struck by an electric car of the defendants which was running backwards in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car, and no special precautions were being observed. The jury were asked, by the Judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed.

J. Bicknell, K.C., for the appellants.

John MacGregor and H. M. East, for the respondent.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A.) held that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded, and was not merely a specific finding in answer to a question.

Per ARMOUR, C.J.O.—Questions to the jury must be in writing.

Per OSLER, J.A.—While it is more convenient that questions to the jury should be in writing, the Judge is not bound to adopt that course.

Judgment of FALCONBRIDGE, C.J., affirmed.

JULY 14TH, 1903.

JUDICIAL COMMITTEE.

RE LORD'S DAY ACT OF ONTARIO.

Constitutional Law—Powers of Provincial Legislature—Act to Prevent Profanation of Lord's Day—Criminal Law—Reservation to Dominion Parliament.

Appeal by the Attorney-General for Ontario and cross-appeal by the Attorney-General for Canada from the judgment of the Court of Appeal for Ontario (1 O. W. R. 312) upon questions submitted to that Court by the Lieutenant-Governor in Council, pursuant to R. S. O. 1897 ch. 84.

The questions submitted are set out in the former report.

J. A. Paterson, K.C., for the Attorney-General for Ontario.

E. L. Newcombe, K.C., and H. W. Loehnis, for the Attorney-General for Canada.

H. S. Osler, K.C., and Lauriston Battem, for the Grand Trunk R. W. Co.

A. B. Aylesworth, K.C., for the Metropolitan R. W. Co.

A. E. O'Meara, for the Lord's Day Alliance of Ontario.

The judgment of the board (Lord Halsbury, L.C., Lords Macnaghten, Shand, Davey, Robertson, and Lindley), was delivered by

LORD HALSBURY, L.C., who said that their Lordships had considered this case, and, speaking without reference to the last question, with which their Lordships would deal separately, which had been suggested for their consideration, they were of opinion that the Act of Parliament, treating it as a whole, was beyond the competency of the Ontario Legislature to enact, and they were prepared to answer that question, therefore, by saying that the Act itself as a whole was invalid. The question turned upon a very simple consideration. The reservation of the criminal law for the Dominion was given in language which their Lordships considered to be very plain, ordinary, and intelligible words, and to be construed according to their natural signification. Those words seemed to their Lordships to require—and, indeed, admitted of—no plainer exposition than the language itself. What was reserved was “the criminal law except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters.” It was, therefore, as had been once said before in that Court, the criminal law in the widest sense; and it was impossible, notwithstanding the very protracted argument to which their Lordships had listened, to doubt that an infraction of the Act which was in operation at the time of Confederation was an offence against the crimi-

nal law. Their Lordships would humbly advise His Majesty that that was the state of the law.

The fact that an exception was taken from the criminal law generally, and that it was expounded as being the constitution of courts of criminal jurisdiction, but including procedure in criminal matters, rendered it more clear (if anything were necessary to render it more clear) that, with that exception, which obviously did not include what had been contended for there, the criminal law, in its widest sense, was that which was reserved for the Dominion Parliament to enact.

With regard to the other questions which it had been suggested should be reserved for further argument, their Lordships were of opinion that it would be inexpedient and undesirable and contrary to the precedents which from time to time had been pointed to in the questions arising before that board, to attempt to give any judicial opinion upon them. They were questions which arose only when properly considered in concrete cases; and any opinion expressed upon the operation of those clauses and the extent to which they were applicable would be worthless for many reasons—they would be worthless as being speculative opinions as to what might arise in the event of particular facts occurring, bringing such and such facts within the operation of those sections. It would be absolutely contrary to principle and very inconvenient and inexpedient that opinions should be given upon these questions at all—they were questions which, when they arose, must arise in concrete cases, in which the rights of private individuals were involved; and it was extremely unwise beforehand for any judicial tribunal to attempt to exhaust all the possible cases and facts which might occur to qualify, cut down, and override the operation of particular words, when the concrete case was not before them. For those reasons their Lordships would decline to answer those questions. The main and substantial question was that on which their Lordships had already expressed their opinion—that this Ontario Act was beyond the jurisdiction of the Ontario Legislature. No order would be made as to costs.

FALCONBRIDGE, C.J.

JULY 20TH, 1903.

TRIAL.

ROGERS v. ROGERS.

Contract—Setting aside—Improvidence—Absence of Independent Advice.

Action to set aside an agreement tried at Stratford.

F. H. Thompson, Mitchell, for plaintiff.

J. P. Mabee, K. C., for defendant.

FALCONBRIDGE, C.J., found that the plaintiff was illiterate and incapable of transacting any business of a complicated nature. He did not understand the nature of the agreement or the transaction which it purported to embody, and he had no professional or other independent advice. The agreement was in the highest degree improvident, and was voluntary and without valuable consideration, and therefore could not stand. Judgment for plaintiff as prayed, with six years' interest. No costs.

HOLMESTED, OFFICIAL REFEREE.

JULY 22ND, 1903.

CHAMBERS.

DOMINION SYNDICATE v. OSHAWA CANNING CO.

Judgment—Consent to, Obtained by Misrepresentations—Motion to Stay Proceedings—Motion to Vacate Judgment—Forum.

Motion by defendants to stay proceedings upon a consent judgment on the ground that the consent was induced by misrepresentations.

R. W. Eyre, for defendants.

H. E. Rose, for plaintiffs.

MR. HOLMESTED:—Where a suitor asserts that his consent to a judgment has been obtained by a misrepresentation of fact on the part of the opposite party or his counsel, he must move promptly to vacate the judgment obtained under such circumstances, and a stay of proceedings can only be granted as an incident of such a motion and until the Court or Judge can dispose of it. The application in such a case would seem to be properly made to the Judge who pronounced the judgment complained of, but, if he should be inaccessible, the motion could no doubt be made to the Judge taking vacation business. Motion dismissed, without prejudice to any application that may be made elsewhere, with costs fixed at \$5.

BRITTON, J.

JULY 22ND, 1903.

TRIAL.

MYERS v. RUPERT.

Limitation of Actions—Real Property Limitation Act—Acquiring Title by Possession to Undivided Half of Lot—Oral Admissions of Title—Conveyance—Acknowledgment—Exclusive Possession—Partition.

Action for partition of land, tried at Cornwall.

D. B. Maclellan, K.C., and F. G. Maclellan, Cornwall, for plaintiff.

James Leitch, K.C., for defendant Rupert.

G. I. Gogo, Cornwall, for defendant Newman.

BRITTON, J.:—The plaintiff claims to be the owner of an undivided half of the north half of the south-west quarter of lot 31 in the 9th concession of Cornwall, and with a view to partition brings this action to establish his title, acquired, as he says, by possession. He admits that the other undivided half is owned by the defendant Beaque Rupert, of which other undivided half the defendant Newman is mortgagee. One Lachlan McDonald owned the whole west half of this lot, and on the 7th March, 1871, conveyed it to Levi Rupert and John L. Rupert as tenants in common.

Levi Rupert was the father of John L. Rupert, and on the 23rd October, 1871, Levi conveyed his interest in this south-west quarter to another son, Adam. The two brothers, John L. Rupert and Adam Rupert, thus became and were the owners of the south-west quarter of lot 31.

Adam, being the owner of an undivided half of the south-west quarter, and in possession of all the south-west quarter, made his will on the 26th March, 1872, giving all his real estate to his wife Caroline for life. He made no disposition of the estate in remainder. On the 30th March, 1872, he died, leaving no issue. His father Levi survived, and so became entitled to Adam's share, subject to the life estate in Adam's widow.

On the 4th March, 1873, Adam's widow, being in possession, married the plaintiff, and he came upon the property and resided upon it, with his wife, from that time until her death, which occurred on 3rd March, 1903. Levi, the father of Adam, died in December, 1885, having first made his will devising his interest in this property to his son, the defendant Beaque Rupert. Upon the death of the wife of the plaintiff (Adam's widow) the defendant Beaque Rupert became entitled to this undivided half, and as to this there is no dispute.

As stated above, the other undivided half was in 1871 owned by John L. Rupert, and on the 1st March, 1872, John L. Rupert conveyed all his interest in the west half to defendant Beaque Rupert.

Plaintiff and wife were in possession of all of the south-west quarter until the 24th December, 1887. Up to that time the defendant Beaque Rupert did not in any way assert his right or title to an undivided half, but apparently acted as if he had supposed his sister-in-law, the widow of Adam,

was entitled to the whole for her life, and that he was entitled to the whole after the widow's death. On the 24th December, 1887, Beaque Rupert bought the right of the wife of plaintiff to the south half of the south-west quarter, paying her \$150 for the same. The plaintiff joined in that conveyance, which contained a recital to which I will refer later. The defendant Beaque Rupert then went into possession of the part so purchased, and the plaintiff and his wife continued in possession of the north half of the south-west quarter, the part now in question, until the death of plaintiff's wife, and plaintiff is still in possession.

What was the position of the matter on 24th December, 1887? The plaintiff was in actual visible possession of it all. Upon the evidence I think he was occupying, supposing his wife had a life interest in all. However it came about, I think plaintiff and his wife and the defendant Beaque were all under the mistaken notion that Beaque had no right to possession until after the death of the wife of plaintiff. Could the plaintiff under such circumstances acquire a title by possession to the undivided half of the defendant? I think he could. I must find upon the facts that the possession was without any express license or authority from the defendant, and that nothing was done to amount to an entry by Beaque Rupert as one of the tenants in common.

It is a fair inference from the evidence that Caroline Myers never intended to hold any more than her husband owned of the land in question—and for her life only, under the will of her husband. The plaintiff, her husband, never until shortly before the commencement of the present proceedings, intended to hold more than his wife held, and only for her life—but they were both in possession, using all, as their own, for all the years from 1873, the plaintiff exercising control, having the property assessed to him, paying taxes upon it, and holding it to the exclusion of the defendant.

As the doctrine of adverse possession is put an end to by the statute, and as sec. 11 makes the Act applicable in favour of one tenant in common in possession, against another who is out of possession, I must find that Caroline Myers, if she had not married but had remained alone upon this land, would before the 24th December, 1887, have acquired a title by possession as against the defendant to the one undivided half. If Caroline Myers, had she remained single, would have acquired title by possession, it follows, I think, that the plaintiff, being in actual visible possession and control from 1873 to 1887, acquired title: see *Darby & Bosanquet on the Statute of Limitations*, pp. 275, 353, 357; and *Cully v. Taylor*, 11 A. & E. 527. The defendant remaining out of possession of this undivided half, when he had a right to it—the

discontinuing possession by those under whom defendant claims, and by the defendant, results in an extinguishment of the defendant's claim: see sec. 15 of ch. 133, R. S. O.

It was shewn that the plaintiff attended and bid at the sale of this property under a mortgage given by the defendant, and it was contended that he thereby admitted defendant's title to this property, subject to the life estate of plaintiff's wife. These were only oral admissions, if admissions at all, and are of no avail to the defendant; and the plaintiff contends that in attending the sale he did so knowing that the wife had for life only the one undivided half.

— On the 24th December, 1887, the defendant Beaque Rupert bought the interest of the wife of the plaintiff in the south half of the south-west quarter. The plaintiff joined in the conveyance. Beaque Rupert subsequently gave a mortgage upon the property, always describing it as the south-west quarter, although he occupied only the south half of the south-west quarter. On the same day that Beaque Rupert obtained the conveyance from the plaintiff and wife, he mortgaged to one McMillan, but there is no evidence that either plaintiff or wife knew at that time of that mortgage, nor did plaintiff know of the mortgage to defendant Newman. Although the fact is that plaintiff did not, beyond what appeared from his possession, assert any title, on the other hand he did not represent to Newman or to any one on Newman's behalf, that he had no claim except in right of his wife. So I think there is no estoppel against the plaintiff and in favour of Newman's mortgage.

It is contended that this conveyance defeats plaintiff's claim, (1) as an acknowledgment in writing of defendant's title; and (2) as shewing that the possession was not of right as owner, or in such a way as to acquire a title under the statute.

It is certainly an acknowledgment in writing, but it has been held that such is not sufficient after the title of the former owner has been extinguished. When that admission was made, the title of plaintiff to the one undivided half had been perfected, and the title of Beaque Rupert to that undivided half had been lost. *Doe d. Perry v. Henderson*, 3 U. C. R. 486, is authority for plaintiff that acknowledgment in writing after expiration of statutory term would not have the effect of revesting title. This case is important as to oral admissions. Also see *Armour on Titles*, 3rd ed., p. 299, and cases there cited.

I would not have been sorry had I been able to apply the principle laid down in *Sanders v. Sanders*, 19 Ch. D. 373.

I have considered whether in this case the admission made in this deed might not raise the presumption that, notwithstanding the outward visible possession, it was a possession not intended to be, and which was not in fact, to the exclusion of the true owner, but I am afraid I cannot so apply it. The difficulty arises as to the two distinct undivided halves of this lot.

As a matter of law they must be dealt with as if defendant had never acquired the undivided half from his father, Levi; as if that still remained with Levi, or some other grantee of Levi, clearly Levi's right would be barred.

If on the 24th December, 1887, the plaintiff and his wife had executed the deed with the recital that Levi was the owner of one half, and that the defendant was the owner of the other, could Levi have claimed? If the defendant, after the expiry of the time required by the Statute of Limitations, and before the death of plaintiff's wife, had attempted to re-enter into possession of his undivided half, he could not have done so, he would have been barred. As to the other undivided half, the wife simply claimed under the will of her husband an estate for life. The defendant could not be barred as to that, unless possession long enough after death of wife.

While not free from doubt, I think the plaintiff entitled to succeed as to the undivided half, and that there must be the division as asked, and judgment for partition, with the usual reference.

The plaintiff must get costs of this trial, to be paid by defendants.

Costs of partition proceedings to be determined and apportioned in the usual way.

BRITTON, J.

JULY 22ND, 1903.

TRIAL.

EVANS v. JAFFRAY.

Partnership—Agreement—Termination—Breach of Contract—Malicious Procuring—Conspiracy—Formation of Company—Purchase of Businesses.

Plaintiff claimed an account of the partnership dealings between him and defendant Jaffray and damages for alleged breach of contract, and damages against the other defendants for the malicious procuring of the breach of contract by defendant Jaffray and for conspiracy. Plaintiff also sought to recover from defendants other than Jaffray \$25,000, being one-half of the sum which it was alleged these defendants

agreed to pay to Jaffray, or one-half of such sum as upon a reference it might be ascertained was the value of what was obtained from defendant Jaffray by his co-defendants.

On the 28th February, 1899, an agreement in writing was entered into between plaintiff and defendant Jaffray as follows:—"Whereas the parties have agreed to undertake the promotion of a company to purchase existing bicycle plants in Canada and to carry on the manufacture of bicycles and parts thereof and to divide equally the profits accruing from such promotion: it is hereby agreed that the said Robert M. Jaffray is to employ himself to procure offers from existing manufacturers and treat for the purchase of plants and business and aid in the formation of a company for the purposes aforesaid; and the said Frederick G. Evans is to assist generally in such purchases and promotion. After payment of all expenses, the profits are to be divided equally, and any loss arising is to be borne in the same proportion."

The plaintiff resided at Windsor, and was a shareholder in and manager of the Canadian Typograph Co. The defendant Jaffray resided in Chicago.

F. A. Anglin, K.C., W. M. Douglas, K.C., and J. E. O'Connor, Windsor, for plaintiff.

S. H. Blake, K.C., and C. W. Kerr, for defendants Ryckman, Cox, and Soper.

G. H. Watson, K.C., and S. C. Smoke, for defendants Jones and the estate of W. E. H. Massey.

R. McKay, for defendant Jaffray.

BRITTON, J.:—The plaintiff had correspondence with the late Senator Sanford, and had interviews with him and Mr. Wm. Hendrie, of Hamilton, which resulted in these gentlemen giving defendant Jaffray a letter dated 13th March, 1899, stating that "if the manufacturers are prepared to consolidate their interests on the basis as proposed in the prospectus submitted . . . we will be prepared to become provisional directors and stockholders in the company to the extent of \$100,000 jointly. . . ." Armed with this letter defendant Jaffray got options or offers from certain companies : . . and as a result and for the purpose of seeing what could be done a meeting was held at . . . Toronto on the 11th April, 1899. . . The meeting . . . resulted in nothing. There was nothing before the meeting regarded by the capitalists present as a business proposition.

The fair inference from the written agreement between plaintiff and Jaffray is, that it was for a short time, and that

plaintiff had in view persons whom he could interest and from whom capital could be obtained. . . . The only suggestion as to any aid plaintiff could give was by interesting Senator Sanford and his friends to such an extent as to get their financial support. Senator Sanford was a stockholder in the company of which plaintiff was manager, and plaintiff knew him well. It appears to me that it was well understood between plaintiff and Jaffray that if Jaffray could get offers or options, and if plaintiff could get the capital, there might be a purchase of some of the existing concerns on such terms as would give a profit, which plaintiff and Jaffray could divide, and that is the whole meaning of the written document, hastily drawn and scantily expressed. Underlying this vague and indefinite agreement, and in some way a part of what was to be accomplished, the plaintiff hoped that the company of which he was manager would be taken over, and that he would become the manager for the company or syndicate that would purchase. . . . When this meeting ended, all ended as to any joint work or joint venture between plaintiff and Jaffray. It was not pretended that plaintiff was to look to other persons than those at that meeting for the necessary capital, nor was it agreed that Jaffray from that time on, as between him and plaintiff, was to procure offers from existing manufacturers or treat for purchase of plant, etc. . . .

Afterwards defendant Ryckman took hold of the matter, having the information from Jaffray, and entered into negotiations with the manufacturers on the one side and the capitalists on the other, with the result that the Canada Cycle and Motor Co. was formed, and certain companies were purchased. Defendants Ryckman, Cox, Jones, Massey, and Soper paid defendant Jaffray for what he did or said or furnished in connection with the matter. . . . The partnership, if it can be called a partnership, was only to continue while both were working together for a common purpose, viz., that Jaffray should get offers to sell, and that plaintiff or plaintiff and Jaffray should find purchasers or capital. When the attempt failed, the contract was at an end, or, if not so understood by plaintiff, Jaffray was justified in believing it to be so, and there was in fact no further action by plaintiff or Jaffray in this joint venture. . . .

Upon the evidence I must hold that the agreement and the relations between the parties created by it, came to an end on the 11th April, 1899; that there is no evidence to sustain the claim against defendants or any of them for the malicious procuring of the breach by Jaffray of his contract with plaintiff; . . . that there is no evidence of conspiracy; that defendant

Jaffray is not liable to account nor for damages for breach of the agreement. The evidence does not shew that plaintiff could with the aid of defendant Jaffray have brought about the formation of a purchasing company so that he could have made anything out of it. There is no equity to compel Jaffray to account for profits: see *Dean v. McDowell*, 8 Ch. D. 345. This is not at all like the case of one partner continuing to carry on the business in the same way after the expiration of the term without paying off the capital or settling with the other: *Parsons v. Hayward*, 4 De G. F. & J. 474. The case is not within the rule that information obtained in partnership business must not be used for any purpose that would compete with partnership business. Here there was no continuing business with which Jaffray as an individual was competing. Action dismissed with costs.

OSLEA, J.A.

JULY 22ND, 1903.

TRIAL.

GARDNER v. PERRY.

Trusts and Trustees—Will—Action by New Trustees against Representatives of Former Trustee—Limitation of Actions—Trustee Act, sec. 32, sub-sec. 1 (b)—Bar—Counterclaim—Lease by Tenant for Life—Value of Straw and Manure on Demised Premises—Covenant—Emblements.

Action by the newly appointed trustees of the estate of Robert Gardner, deceased, against the executors of the will of Marietta Gardner, one of the executors named in the will of Robert Gardner, to compel defendants to make good losses occasioned, as alleged, by the negligence of Marietta Gardner in permitting one Thomas Holtby, a co-executor and trustee, to misappropriate large sums of money belonging to the estate of Robert Gardner, a wealthy farmer, who died in November, 1870, leaving a will, probate of which was granted on the 22nd December, 1870, to the executors and executrix named therein, viz., Thomas Holtby, Joseph Gardner (testator's brother), and Marietta Gardner (widow of testator). By the will the testator gave the income of his estate to the widow for her life, and, subject to certain legacies and bequests, devised the residue to be equally divided at her death between the children of his brothers and sisters. The executors and executrix were "to carry this my last will into effect," and power was conferred upon them "to dispose of the property if they think proper." Joseph Gardner, apparently with the consent of his co-executors, assumed and retained the management and administration of the estate up to the time of his death in December, 1885, by which date some of the real property had been disposed of and the pro-

ceeds invested. After this the whole management fell to Thomas Holtby, who was then of good business credit and reputation and an intimate and trusted friend of the widow. She was then about 75 years of age, and, though described as a person of more than ordinary strength of character and mental qualities, was entirely unaccustomed to business, and left to Holtby not only the sole administration of the trust estate, but also intrusted to him or left in his hands the management of the income derivable by her therefrom, and of her financial affairs generally. In November, 1895, an action was brought against Holtby by Marietta Gardner for an account, and the result was that he was charged with a balance of \$4,173.27 of principal moneys belonging to the estate in his hands at the date of the Master's report of the 27th June, 1896, which sum with interest he was ordered to pay to the receiver in the action. Marietta Gardner's costs (\$469.50) were ordered to be paid to her out of the estate, "reserving to the residuary legatees leave to recover back the same if so entitled by way of damages from the plaintiff (Marietta) for alleged breach of wrongdoing in respect of the estate, should it be established in any action to be brought by them against plaintiff for that purpose." On the judgment so recovered against Holtby, no more than \$203.57 was realized, and the rest remained unpaid, as also his defalcation in respect of the widow's own estate, amounting to upwards of \$2,200. Marietta Gardner died at the age of 92 in January, 1902. Holtby, the surviving executor of Robert Gardner's will, was removed by order and plaintiffs appointed trustees of the will and of the estate. They brought this action on the 31st May, 1903. All the alleged acts of negligence or breaches of trust charged against Marietta Gardner, including her delay after notice in taking proceedings against Holtby, occurred more than six years before action, and her representatives pleaded sec. 32, sub-sec. 1 (b), of the Trustee Act, R. S. O. 1897 ch. 129, as making the lapse of that time a bar to an action at the suit of the trustees. They also pleaded the provisions of the Trustee Relief Act, 1899, 62 Vict. (2) ch. 15, sec. 1.

E. E. A. DuVernet, for plaintiffs.

G. F. Shepley, K.C., for defendants.

OSLER, J.A.:—The present action being brought by the new trustees of the Robert Gardner estate against the representatives of—those claiming under—one of the former trustees, *Re Bowden, Andrew v. Cooper*, 45 Ch. D. 447, is a clear decision that, upon the facts set forth, sec. 32, sub-sec. 1 (b), of the Trustee Act operates as a bar to the demand and a de-

fence to the action. The application of sub-sec. 1 (b) is left untouched by the decision of the Court of Appeal in *How v. Earl Winterton*, [1896] 2 Ch. 626. The case is not brought within any of the exceptions in sub-sec. 1, and the result is, that, although the beneficiaries under the will whose interests become interests in possession on the death of Mrs. Gardner, the tenant for life, may not be barred, an action at the suit of the trustees, whose duties came to an end at her death, is barred. *Re Cross, Harston v. Tenison*, 20 Ch. D. 109, distinguished. *Lewin on Trusts*, 10th ed., pp. 1084, 1085, 1086, and *Re Swain*, [1891] 2 Ch. 233, referred to.

During Marietta Gardner's lifetime two of the farms belonging to the estate were demised by her for five years and six months, "provided the lessor, who is tenant for life, shall so long live." The lessees covenanted to cultivate in a husbandlike manner, and to "spread, use, and employ in a proper husbandlike manner all the straw and manure which shall grow, arise, renew, or be made thereupon, and will not remove or permit to be removed from the premises any straw of any kind, manure, wood, or stone, and will carefully stack the straw in the last year of the said term, turn all the manure therein into a pile so that it may thoroughly heat and not so as to kill and destroy any foul seeds which may be therein, and will thereafter and not before spread the same on the land." The demises came to an end on Marietta Gardner's death, and her executors, the defendants, counter-claimed for the value of the straw and manure on the demised premises. . . . In my opinion, defendants are not entitled to this property as emblements, their testatrix not having been the actual occupier or cultivator of the lands on which it was produced: *Woodfall*, 15th ed., 790, 793; *Williams on Executors*, 9th ed., 623; *Wharton's Law Lexicon*, 265; *Black's Law Dictionary*, 656; *Bradley v. Bradley*, 56 Conn. 374. But for the lessees' covenants they would have been entitled to the straw as an emblemment, and also to the manure, which had been collected and piled into heaps. The covenants, however, preclude the lessees from making any claim. The covenant may be construed or held to operate as a reservation of the straw and manure to the lessor: *Heald v. Builders Ins. Co.*, 111 Mass. 38: to be expended and dealt with in the stipulated manner. The lessees' right or power and obligation so to expend it came to an end with the death of the lessor, and the property passed to her representatives unrestricted thereby: *Hindle v. Pollitt*, 6 M. & W. 629; *Elliott v. Elliott*, 20 O. R. 134; *Snetsinger v. Leitch*, 32 O. R. 440; *Leigh v. Lillie*, 6 H. & N. 165.

Action dismissed with costs. Judgment for defendants on counterclaim for \$96 with costs.

FERGUSON, J.

JULY 23RD, 1903.

TRIAL.

GODERICH ELEVATOR CO. v. DOMINION ELEVATOR CO.

Principal and Agent—Contract Made by Agent—Scope of Authority—Principal not Bound.

Action to recover \$2,250, the price of certain storage space in plaintiffs' elevator at Goderich alleged to have been contracted for but not used by defendants.

FERGUSON, J., held, upon the correspondence and evidence, that there was not a completed contract for the space in plaintiffs' elevator at the rates of storage charged by plaintiffs; that one Cavanagh, with whom plaintiffs corresponded, was not a general agent of defendants, but only a special agent having no authority by implication, but only such authority as was directly given him by defendants; and that defendants were not bound by Cavanagh's acceptance of plaintiffs' rates, and would not have been bound even if his conduct had been free and voluntary and not induced by the promise of plaintiffs to protect him if he accepted. Lest it should be considered of importance hereafter, the learned Judge found upon the evidence that plaintiffs did reserve space for 150,000 bushels in their elevator, and that this space remained unoccupied during the period for which plaintiffs sought to recover, although plaintiffs made reasonable efforts to relet it to others.

Action dismissed with costs.

FERGUSON, J.

JULY 23RD, 1903.

TRIAL.

CHARLTON v. BROOKS.

Gift—Donatio Mortis Causa—Evidence—Cash and Notes—Delivery of Key of Box—Counterclaim—Costs.

Action by the administrators of the estate of the late William Charlton to recover certain moneys and notes from the defendant, the daughter of the deceased. She claimed them as the subject of a donatio mortis causa.

J. M. Glenn, K.C., and C. St. Clair Leitch, Dutton, for plaintiffs.

Talbot Macbeth, K.C., for defendant.

FERGUSON, J.: — The intestate was at the time of his death in his 99th year, but retained all his faculties till his last illness, which lasted only two weeks. He was taken ill on the 5th January, 1903, and died on the 19th of the same month. He was living at the time with defendant. On the morning of the 5th January he became ill and went to his room, where his daughter followed him. He had three keys in a wallet in his pocket. He had a foreboding that this would be his last illness. He took the keys from his pocket and handed them to defendant, saying, "All the money and notes I have got are yours." One key was that of his trunk which was in the room; another was the key of a cash box, which was in the trunk; and the third was the key of a chest of drawers. Defendant took the keys and examined them, and kept them. In the cash box were the promissory notes and cash in question. Defendant took possession of these and retained possession. The evidence of defendant was corroborated by that of her son, who was present at the time. There was no question as to the intestate having died of the illness that was upon him at the time of the alleged gift. There was evidence that he intended to give what property he might have to defendant. In my opinion a good donatio mortis causa is established. *Mustapha v. Wedlake*, 8 Times L. R. 160, followed. *McDonald v. McDonald*, 33 S. C. R. 145, referred to. Defendant counterclaimed for \$67.50, the amount of doctors' bills and funeral expenses paid by her. Judgment dismissing action with costs against plaintiffs in their representative character. Judgment for defendant for the amount of her counterclaim against plaintiffs, also in their representative character. No order as to costs of counterclaim. Plaintiffs may reasonably charge their costs against the estate in their hands or to come into their hands as administrators.

MEREDITH, C.J.

JULY 23RD, 1903.

TRIAL.

O'BRIEN v. ELLIS.

Seduction—Right of Action—Death of Father after Cause of Action Complete—Action Brought by Mother—Failure to Establish Loss of Service—Application to Amend and Proceed as Administratrix of Father's Estate—Statute of Limitations—Trustee Act—Bar.

Action for seduction brought by the mother, who based her right to recover on the alleged existence of the relation of master and servant between her and the seduced daughter. The action was begun on the 24th September, 1902, and the

statement of claim was delivered on the 10th January, 1903. By the statement of defence, delivered on the 20th of the same month, defendant, besides making a general denial, challenged plaintiff's right to maintain the action, setting up that the father of the girl was living at the time of the alleged seduction (June, 1900), and did not die until 15th June, 1902. On 11th February, 1903, plaintiff replied asserting her right under R. S. O. ch. 69 to maintain the action, and alleging that she had sustained loss of service. At the trial plaintiff's counsel asked for leave to amend by setting up a further claim by plaintiff as the personal representative of the father, the plaintiff having obtained letters of administration to his estate on 4th March, 1902. The case was allowed to go to the jury, the question of amendment being reserved. The jury found the seduction proved, and that the daughter was not the servant of plaintiff, and they assessed the damages at \$500.

W. B. Craig, Renfrew, for plaintiff.

W. H. Stafford, Almonte, for defendant.

MEREDITH, C.J., held that the amendment should not be allowed to enable plaintiff to set up a new cause of action barred by the Statute of Limitations (sec. 10 of the Trustee Act, R. S. O. ch. 129, more than a year having elapsed since the death of the father), at the time the application to amend is made: *Darby & Bosanquet*, 2nd ed., p. 561, and cases there cited; *Hudson v. Fernyhaugh*, 61 L. T. R. 722; *Lancaster v. Moss*, 15 T. L. R. 476; *Bugbee v. Clergue*, 27 A. R. 96. Plaintiff maintained down to the trial that the cause of action for which she was suing was her own, and not that of her husband sued for by her in her representative capacity as the administratrix of his estate, and even at the trial she sought, not to withdraw entirely from that position, but to continue the action in her own right, and to add a further claim in right of her husband and in her representative capacity. The two causes of action are separate and distinct, and none the less so because they are asserted by the same person. Had some one else been the administrator, and an action had not been begun by him in time, the defendant would have been freed from all liability to him. Defendant is freed from the claim of plaintiff in her own right because she has failed to establish it against him, and from that of her husband's estate because no action in respect of it was begun within the prescribed period.

Action dismissed, but without costs.

MEREDITH, C.J.

JULY 23RD, 1903.

TRIAL.

JOHNSTON v. VILLAGE OF POINT EDWARD.

*Way—Injury to Traveller—Liability of Municipality—Negligence—
 Diversion of Road—Removal of Bridge—Neglect to Warn or Bar—
 Contributory Negligence.*

Plaintiff, who was driving in a buggy drawn by a single horse from Point Edward to Sarnia along the main travelled road, on the night of 22nd November, 1902, a dark night, drove into a canal which crossed the road at right angles, and he sued defendants to recover damages for the injuries he sustained, which he alleged were caused by the negligence of defendants in removing a bridge which had existed for many years over the canal in the line of the road, without providing and maintaining any sufficient guard or barrier to prevent persons using the road from driving into the canal.

A. Weir, Sarnia, for plaintiff.

A. B. Aylesworth, K.C., and J. Cowan, K.C., for defendants.

MEREDITH, C.J., held that the evidence was sufficient to establish that the *locus in quo* was part of a highway called "the diverted road" under the jurisdiction and control of defendants, which it was their duty to keep in repair. In August, 1902, the corporation of the town of Sarnia, with the consent of defendants, made a change in the line of the "diverted road," the effect of which was to move the travelled way from its then position a short distance to the east of it, and to carry the roadway across the canal by means of a covered sewer pipe culvert, and to discontinue the use of the former travelled way from a point near the north end of the diverted way to a point a little distance east of the bridge which was removed. No barrier or other guard was placed across the former travelled way at the point where the change in alignment began at the north end, but one was erected across it, about opposite the park gate, extending from the new culvert to within about ten feet of the park fence. This barrier was spoken of as a temporary one, and was insufficient for the purposes for which it was intended. There was a conflict of evidence as to whether it had been kept standing from the time it was put up until the time of the accident. . . . The evidence given by plaintiff was to be preferred, and it shewed that the barrier was often, in part at least, overthrown, and that for at least two days before the accident it was down in part so

as to be quite insufficient to prevent persons driving along the old roadway in the dark from driving into the canal. Defendants were guilty of negligence in not providing a sufficient barrier or guard, and they were also negligent, knowing, or having the means of knowing, if they had taken any reasonable care, that the barrier which had been erected, was often overthrown, in not either being more vigilant in watching as to its condition, or not, as they after the accident did, replacing it by a sufficient fence. Plaintiff was not chargeable with negligence, for, although he had driven over the culvert in going to Point Edward on the same evening, he said he did not notice that the bridge had been removed, or that any change had been made in the road; when he was returning, the night was dark, and it was the most natural thing that his horse should follow the old way, there being nothing at the point of divergence to prevent persons from continuing.

Judgment for plaintiff for \$400 with costs.

JULY 23RD, 1903.

DIVISIONAL COURT.

WASON v. DOUGLAS.

Deed—Description—Boundary—Medium Filum Aquæ—Ascertainment of Centre Line.

Appeal by defendant from judgment of LOUNT, J. (1 O. W. R. 552), in favour of plaintiff in an action for trespass to land, an island in Blind Creek. The action was first tried by a jury, who found in favour of plaintiff. A Divisional Court (21 C. L. T. Occ. N. 521) directed a new trial for the purpose of ascertaining the true boundary between plaintiff's and defendant's land, holding that the description in the conveyance to defendant entitled him to the medium filum aquæ as his boundary, and the position of the centre line of the stream was the matter to be determined; that the centre line of whichever channel was the main channel in 1883 would be the centre line of the stream, and the jury should be asked to find, if there were two channels, which was the main channel in 1883. The case was then tried without a jury, but the trial Judge did not make a finding upon the point indicated by the Court.

E. B. Edwards, K.C., for defendant.

G. H. Watson, K.C., and G. Edmison, K.C., for plaintiff.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J.) found that the northerly channel was originally, and at the time

of the conveyance to defendant, the main channel of Blind Creek, and that the boundary line between plaintiff and defendant is the centre line of this northerly channel. Appeal allowed without costs and action dismissed with costs.

MEREDITH, C.J.

JULY 24TH, 1903.

CHAMBERS.

RE McMICHAEL AND DOIDGE.

Will — Devise — Construction — Condition — “Die without Lawful Issue” — Lifetime of Testator.

Application under Vendors and Purchasers Act, R. S. O. ch. 112, in respect of an objection to title raised by the purchaser. The vendor derived title under the will of his mother, Calista Truax McMichael, dated 18th July, 1884:—
“I will, devise, and bequeath all real and personal property . . . as follows: 1. To my son, Isaac Luther McMichael, I will, devise, and give all the above mentioned absolutely and forever in fee simple. 2. But should the said Isaac Luther McMichael die without any lawful issue of his body, then all and whatsoever he would have and taken under and by virtue of this will shall be equally divided among my five brothers. . . .”

J. G. Gauld, Hamilton, for vendor.

M. G. V. Gould, Hamilton, for purchaser.

MEREDITH, C.J., held that the words “die without lawful issue of his body” are explained by the words “then all and whatsoever he would have and taken under and by virtue of this will,” which precede the executory devise, and shew that the testatrix was providing for the death of her son in her lifetime, and, as he survived her, the gift to him became absolute. Order declaring accordingly. If the parties have not agreed as to the disposition of costs, each party will bear his own costs of the application.

MEREDITH, C.J.

JULY 24TH, 1903.

CHAMBERS.

RE MACKEY.

Will—Legacies—Specific or Demonstrative—Succession Duty.

Motion for summary determination of certain questions arising on the will of William Mackey and the codicils to it. The only questions reserved related to the legacies to Alice and Agnes Cassidy, bequeathed by the codicil of 22nd September, 1902. By paragraphs 1 and 2 the testator bequeathed to each of five named persons one debenture of the

city of Ottawa for \$1,000, bearing interest at 4 per cent. By paragraph 3 he bequeathed to Alice Cassidy one debenture similarly described, and by paragraph 4 the same to Agnes Cassidy. By paragraph 5 he provided that "if I should deliver over any of the said debentures in my lifetime to any of the above named legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." At the time the codicil was executed and at the time of his death, the testator was possessed of a considerable number of such debentures, each bearing interest at 4 per cent.

M. J. Gorman, K.C., for the executors.

W. D. Hogg, K.C., for the residuary legatees.

D'Arcy Scott, Ottawa, for Alice and Agnes Cassidy.

R. G. Code, Ottawa, for certain legatees.

J. C. Grant, Ottawa, for Henry Mackey.

MEREDITH, C.J., held, that the legacies were not specific. As to what is a specific legacy, see *Purse v. Snapling*, 1 Atk. 417; *Bothamley v. Sherson*, L. R. 20 Eq., 304; *Re Ovey*, 20 Ch. D. 664; *Robertson v. Broadbent*, 8 App. Cas. at p. 82; *Williams on Executors*, 9th ed., 1019; *Am. and Eng. Encyc. of Law*, 2nd ed., vol. 18, p. 714. The most recent English authority, *Re Nottage, Palmer v. Jones*, [1895] 2 Ch. 657, supports the conclusion that these are not specific. The legacies not being specific, the legatees are not entitled to receive them free from succession duties. But, even if the legacies were specific, they would have been subject to duty. The succession duties fall, according to R. S. O. ch. 24, upon the property of the testator in the hands of his personal representatives, and by sec. 14 it is made their duty to deduct the succession duty from any estate, legacy, or property subject to the duty which they have in charge or trust, or to collect the duty thereon upon the appraised value thereof from the person entitled to the property, and they are forbidden to deliver any property subject to the duty to any person until they have collected the duty on it. This language applies to a specific legacy, and there is no ground for the contention that the succession duties on legacies should be paid out of the residue: *Kennedy v. Protestant Orphans Home*, 25 O. R. 235; *Manning v. Robinson*, 29 O. R. 480. See also *Re Maryon Wilson*, [1900] 1 Ch. 565. Order accordingly. Costs of all parties out of the estate, those of the executors between solicitor and client.

MEREDITH, C.J.

JULY 24TH, 1903.

TRIAL.

WOODRUFF v. ECLIPSE OFFICE FURNITURE CO.

Patent of Invention—License—Royalties—Assignment of License by Licensees—Formation of Company—Inference of Contract to Pay Royalties—Statute of Frauds—Executed Consideration.

Action to recover royalties alleged to be due to plaintiff by defendant company, or the added defendants, Seybold and Gibson, in respect of the manufacture of office files, for an improvement in which he had obtained letters patent for Canada, and which he alleged defendants manufactured under a license from him by the terms of which the royalties sued for became payable from them to him. The defence was confined to a denial of any contractual or other obligation to pay the royalties. An exclusive license for Canada was granted by plaintiff on 1st June, 1892, to Gottwals & Co., a firm composed of G. W. Orme and W. O. Gottwals. This license contained a provision that it should not be transferable without plaintiff's consent. On 10th February, 1893, Orme, with plaintiff's consent, assigned his interest in the license to defendants Seybold and Gibson, and on the same day articles of co-partnership were entered into between them and Gottwals for the manufacture of files, cabinets, and office furniture. By the terms of these articles, the assets and business of Gottwals & Co., including their interest in the license, half of which belonged to Gottwals, and half to the added defendants, became part of the assets of the new firm, which was called the Eclipse Office Furniture Co. No formal consent was given by plaintiff to this transfer of the license. On 24th April, 1893, an agreement in writing was entered into between the added defendants, Gottwals, C. B. Powell, and F. P. Bronson, by which the latter two became partners in the Eclipse Office Furniture Co., and it was agreed that a joint stock company should be formed to acquire and carry on the business of the partnership. By an agreement of 5th June, 1893, made between the members of the partnership, certain changes were made, and Gottwals agreed to assign to W. G. Bronson a part of his share. On 28th June, 1893, the proposed company was incorporated under the name of the Eclipse Office Furniture Co. of Ottawa, Limited. On 12th July, 1893, E. H. Bronson, to whom the business and assets of the partnership had been transferred in trust for the company about to be formed, and the members of the partnership, conveyed to the company the business of the partnership and all the goods, chattels, patents of invention, goodwill, book debts, and other assets of the business, subject to any outstanding

liabilities "due" in respect of the business. No formal consent was given by plaintiff to any of these transactions. The company continued the business, paying royalties to plaintiff down to the end of 1895, when they ceased to pay. On 29th March, 1894, the defendant company endeavoured to induce plaintiff to enter into an agreement with them reducing the minimum royalty and providing that the agreement might be put an end to on notice, but plaintiff declined to agree to what was proposed.

W. D. Hogg, K.C., and F. A. Magee, Ottawa, for plaintiff.

A. W. Fraser, K.C., and H. A. Burbidge, Ottawa, for defendant company.

Glyn Osler, Ottawa, for defendants Seybold and Gibson.

MEREDITH, C.J., held that a new contract ought to be inferred: *Howard v. Patent Ivory Mfg. Co.*, 38 Ch. D. 156. *Bagot Pneumatic Tire Co. v. Clipper Pneumatic Tire Co.*, [1901] 1 Ch. 196, [1902] 1 Ch. 146, distinguished. The inference ought to be drawn from all the facts and circumstances that defendant company contracted directly with plaintiff to pay to him the same royalties as Gottwals & Co. had agreed to pay. The Statute of Frauds affords no answer, for sec. 4 does not apply where the consideration is executed, as it was in this case by the permission given by plaintiff to manufacture and sell the invention, or where the contract is wholly executed or intended to be so by one of the parties to it within the year, although there are acts to be done by the other party beyond the prescribed period. But, even if the statute were applicable, defendant company would be liable to pay a reasonable royalty, having had the benefit of the agreement for the whole period it had to run, and upon a quantum meruit the compensation should be assessed at the rate which was agreed upon: *Boydell v. Drummond*, 11 East 154.

Judgment for plaintiff against defendant company for \$1,134 with costs, but without interest. Action dismissed as against added defendants without costs.

JULY 24TH, 1903.

DIVISIONAL COURT.

ARMSTRONG v. ANNETT.

Fences—Boundary Fence between Farms—"Snake Fence"—Relaying—Encroachment—True Boundary.

Appeal by defendant from judgment of Judge of County Court of Lambton in favour of plaintiff in an action in that

Court to recover possession of a strip of land in the township of Brooke. The difficulty arose out of the alleged removal by defendant of a part of the line fence between his land and that of plaintiff.

I. F. Hellmuth, K.C., for defendant.

G. F. Shepley, K.C., for plaintiff.

The judgment of the Court (FERGUSON, J., MACMAHON, J.) was delivered by

FERGUSON, J.:—Plaintiff is the owner of the east half of lot 20 in the 11th concession, and defendant of the west half of lot 21 in the same concession. Many years ago a surveyor ran a line as the dividing line between these properties, and a fence was put, or supposed to be put, on this line. Part of it was to be maintained and repaired by plaintiff and part of it by the predecessor in title of defendant. The fence remained in the place where it was first erected for a long series of years, without any objection. At the place where the subject of this contention is located, the fence was a "snake fence," and at this place fell to the lot of defendant to maintain and repair. The fence at this place having become dilapidated, the defendant, without notice to plaintiff, began the repair and relaying thereof. Plaintiff complained that defendant, in relaying the fence, so laid it as to take in part of plaintiff's farm. The quantity of land claimed by plaintiff is small, valued at about 17 cents, but in one of the corners or angles of the old fence and on the plaintiff's side, stands an oak tree valued at about \$20, and defendant in laying the new fence so managed the matter that this oak tree is standing in or near an angle of the new fence, but on defendant's side. Defendant contends that he so laid the new fence that the centre line of it coincides with what was the centre line of the old fence. Plaintiff called a surveyor, one Code, and defendant called another surveyor, one Jones. The evidence, surveys, and plans of these two do not agree. The trial Judge preferred the survey of Code. In our opinion the trial Judge was right, and according to the survey of Code the defendant's contention must fail. There is a strip of land which, according to the old fence, belonged to plaintiff, which is now on defendant's side of the new fence. The centre lines of the old and new fences do not coincide or nearly so, and there is a difference to the disadvantage of plaintiff. The oak tree stands at present on the wrong side of the rails of the fence. Appeal dismissed with costs.

MEREDITH, C.J.

JULY 27TH, 1903.

CHAMBERS.

McINTYRE v. MUNN.

Summary Judgment—Rule 603—Debt or Liquidated Demand—Contract—Claim for Money Advanced after Deduction for Timber Supplied—Absence of Ascertainment.

Appeal by defendant from order of one of the local Judges at Walkerton allowing plaintiff to sign judgment under Rule 603 for \$500. Action to recover the balance of certain moneys which were advanced by plaintiff to defendant on account of the price of timber, which, by an agreement dated 2nd October, 1902, defendant contracted to manufacture for and deliver to plaintiff, after deducting from the amount of the advances what defendant was entitled, according to plaintiff's contention, to be paid for the timber which he had delivered. The agreement provided for payment of the price of the timber upon delivery. No adjustment of the accounts between the parties appeared to have taken place, and there was no ascertainment of the amount which defendant was entitled to be paid for timber delivered.

G. H. Kilmer, for defendant.

M. H. Ludwig, for plaintiff.

MEREDITH, C.J., held that the claim was not one to recover a debt or liquidated demand in money upon a contract, express or implied, within the meaning of Rule 603. There never was any contract to repay the advances as such, but only an implied contract to repay on completion of the contract what, if anything, after crediting upon the advances what defendant should be entitled to be paid for the timber which he had delivered, it should be found that he had been overpaid. Such a claim—the amount of the credit not having been ascertained by the acts of the party—is neither a debt nor liquidated demand in money. Appeal allowed with costs here and below to defendant in any event.

MEREDITH, C.J.

JULY 27TH, 1903.

CHAMBERS.

HOWARD v. QUIGLEY.

Will—Construction—"Land Property"—Absence of Residuary Devise—Inferential Bequest of Personality—Parties—Next of Kin—Intestacy.

Motion by Eliza Howard (plaintiff) for payment out to her of the moneys in Court to the credit of this action.

The action was to recover possession of a farm in the county of Renfrew and for mesne profits. Defendant counterclaimed for specific performance of an agreement alleged to have been made between him and plaintiff's deceased husband, George Howard, under whose will plaintiff claimed, for the sale to defendant of the farm, and the plaintiff and her infant son were made defendants by counterclaim. Specific performance was adjudged, and the residue remaining due of the purchase money (after making certain deductions), \$1,141.52, was paid into Court subject to further order, and plaintiff asked to have it paid out to her. George Howard's will contained the following provision: "I give, devise, and bequeath all the land property of which I hold deeds together with all the farm stock, farm implements, and machinery, and all my other personal belongings, to my wife Eliza until my son Lloyd Carson Howard comes to the age of 21 years. Then, on payment by him of the sum of \$1,500 to my wife Eliza, the above named land property, stock, and machinery becomes the property of my son Lloyd Carson Howard." The will did not contain any effective disposition of the residue, a blank having been left in a clause apparently intended to provide for the disposition of the residue, for the name of the beneficiary. The will made no disposition of testator's personal estate except that contained in the clause quoted, though the provisions for the disposition of the testator's property were preceded by the words, "I give, devise, and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say," and they were followed by bequests of five pecuniary legacies, and these by the clause quoted.

J. H. Moss, for plaintiff.

F. W. Harcourt, for infant.

MEREDITH, C. J.:—It was argued that plaintiff was entitled, subject to the payment of debts, funeral and testamentary expenses, and legacies, to the whole of the personal estate absolutely. In my opinion there is no ground for this contention, as the enjoyment by the wife of everything given to her except the \$1,500 is limited to the minority of her son. It was further argued that the whole of the personal estate was included in the gift to the wife, and that she was entitled to the use and enjoyment of it during her son's minority. . . . The word "land" in the clause quoted is descriptive of the kind of property, that is, landed property, and is not to be read as a separate noun—"land" and "property." It was then argued that the words "and all my other personal belongings" passed all

the general personal estate except that specially mentioned. I think the words are the equivalent of "and all my other personal property," and all the general estate of testator passed to plaintiff until her son is of age. But, there being no residuary clause, the next of kin should be before the Court, as they are entitled to be heard in support of the contention that the general personal estate did not pass by the will, and was therefore undisposed of and passed to them. Motion refused with costs, unless plaintiff chooses to bring the next of kin before the Court, in which case the application will stand for further argument, and the costs will be reserved to be then dealt with.

BRITTON, J.

JULY 27TH, 1903.

TRIAL.

AHERN v. BOOTH.

Water and Watercourses—Dam—Obstruction to Flow of Stream—Rights of Riparian Owner—Interference with Power—Evidence.

Action for an injunction to restrain defendant from erecting or maintaining a dam or wall which, it was alleged, obstructed the flow of the water of the Ottawa river to the damage of plaintiff as the owner of lands higher up on the river. Plaintiff was the owner of land and of an undeveloped or unutilized water power in the Province of Quebec, on the shore of the river Ottawa, at or near the upper or little Chaudière fall, said to be about 4,000 feet distant up the river from the lower or big Chaudière fall. Defendant was the owner of mills and of water power at the big Chaudière fall. Defendant had built upon his property an addition to his pier, called a "dam," "a wing-dam," a "wall," projected westward into the stream, which is said to lessen the width of the outlet of the river over the lower Chaudière fall. The plaintiff complained that this dam or wall will at certain seasons of the year pen and force back the water of the river so that it will be hindered and prevented from flowing by and away from the lands of plaintiff as it ought to do, and will thereby seriously injure the water power owned by and the rights of plaintiff at the little Chaudière fall.

A. B. Aylesworth, K.C., and N. A. Belcourt, K.C., for plaintiff.

G. F. Shepley, K.C., and J. Christie, Ottawa, for defendant.

BRITTON, J.:—To entitle plaintiff to succeed in this action he must establish that the dam or wall complained of

will so materially obstruct the flow of the river as to interfere with plaintiff's water power, that is to say, that such back water will be occasioned as to reduce the head or fall of the water at the place where plaintiff proposes to utilize it. It was conceded that if any damage should result, it would be only in times of high water. After the most careful consideration of the evidence, and with the aid of the plans and photographs produced and explained, and after a view of the premises, I am of opinion that plaintiff has failed to establish that this dam or wall of defendant will injure the water power or rights of plaintiff at the little Chaudière fall. Upon the evidence it will not injure plaintiff's water power to any extent. Action dismissed with costs.

MEREDITH, C.J.

JULY 27TH, 1903.

TRIAL.

SAUNDERS v. BRADLEY.

Will—Trusts — Power to Appoint New Trustee — Persons to Exercise Power — Time for Exercising — Death of Trustee after Death of Testator—" Surviving Brothers and Sisters "—" Then "—Action— Parties—Cestuis que Trust.

Plaintiff, claiming to be a co-trustee with defendant under the provisions of the will of Richard I. Bradley, deceased, brought this action to compel defendant to permit him to assist in the management and control of the estate and of the trusts of the will, and for a declaration that plaintiff was a trustee under the will. By paragraph 3 of his will the testator appointed his brothers, William J. Bradley (the defendant) and Edward Bradley, executors of, and trustees of the trusts created by, the will, and made provision for the appointment of new trustees in these words: "In the event of the death or the inability or refusal to act of either of said trustees, then my surviving brothers and sisters, or a majority of them, shall by an instrument in writing, executed in the manner in which conveyances of real property are required to be executed in the said Province of Ontario, Canada, appoint a new trustee to act in the place of such trustee," etc. The testator died 27th March, 1899. His will was proved by his two executors, and letters probate issued to them on the 19th May, 1899. Edward Bradley died on the 28th July, 1899. The brothers and sisters of the testator who survived him were seven, all of whom were living except Edward and John, who died 19th August, 1899. Of the then surviving five, three, viz., Mary Jane Saunders, Maggie M. Palmer, and Eliza Ann

Campbell, executed an instrument on the 31st July, 1900, by which they purported to appoint plaintiff to be a trustee in the place of Edward.

A. B. Aylesworth, K.C., and F. W. Kittermaster, Sarnia, for plaintiff.

W. R. Riddell, K.C., and H. J. Dawson, Petrolia, for defendant, contended that the power of appointment never became operative, because both of the trustees appointed by the will survived the testator, and the power applied, in the case of death, only to death in the testator's lifetime.

MEREDITH, C.J., held that such a power is exercisable whether the event happens in the lifetime of the testator or after his death: *Re Hadley*, 5 DeG. & Sm. 67; *Nicholson v. Wright*, 26 L. J. N. S. Ch. 312; S. C., sub nom. *Nicholson v. Smith*, 3 Jur. N. S. 313; *Noble v. Meymott*, 14 Beav. 477; 23 & 24 Vict. ch. 145; sec. 27 (Imp.); 56 & 57 Vict. ch. 53, sec. 10 (Imp.); R. S. O. ch. 129, sec. 4, sub-sec. 2; *Lewin on Trusts*, 10th ed., p. 778; *Perry on Trusts*, 5th ed., sec. 291. Also, having regard to the object of the provision in question, viz., that there should be two trustees acting in the execution of the trusts of the will, the survivors at the time of exercising the power, or a majority of them, is what is meant; and the reasons which led to the adoption of the rules for determining at what period survivors are to be ascertained for the purpose of determining who are entitled to take real or personal property under the provisions of a will, are not applicable. The word "then" used by the testator, does not refer to time, but is the equivalent of "in that case." No case has been found in which the precise question has been raised and determined. Had the words been "my brothers and sisters," omitting the word "surviving," the weight of authority is in favour of the view that those who answer the description at the time it is desired to exercise the power, may properly exercise it: *Sohier v. Williams*, 1 Curtis C. C. 479; *Perry on Trusts*, 5th ed., sec. 294; *Sugden on Powers*, 8th ed., p. 128; *Lewin on Trusts*, 10th ed., p. 718; *Brassey v. Chalmers*, 4 DeG. M. & G. 528; *Jefferys v. Marshall*, 19 W. R. 95. *Sykes v. Sheard*, 2 DeG. J. & S. 6, is opposed to this view. The power of appointment was, therefore, exercisable by a majority of the brothers and sisters who were living at the time the instrument was executed, but no formal judgment now pronounced, because none of the cestuis que trust except defendant is before the Court, and it is at least doubtful whether any judgment should be pronounced in their absence. The case is to stand over for argument on this point unless it can be arranged that some

of the cestuis que trust be made defendants. In that case, if the added defendants desire to be heard, the case must be reargued.

MEREDITH, C.J.

JULY 27TH, 1903.

TRIAL.

CROSSETT v. HAYCOCK.

Dower—Action for—Bar by Deed Executed by Married Woman during Infancy — Purchaser for Value — R. S. O. ch. 169, s. 5 — Family Arrangement. .

Action to recover dower in certain lands of which the deceased husband of plaintiff was the owner in fee simple during the existence of the marriage, and which he, after his marriage with plaintiff, conveyed to defendant, his son, in 1895, for the expressed consideration of \$3,200. The plaintiff joined in the deed and thereby barred her dower, but she was an infant, and now set up that the bar was not binding on her.

W. R. Riddell, K.C., and V. Sinclair, Tilsonburg, for plaintiff.

G. F. Mahon, Woodstock, for defendant.

MEREDITH, C.J.:—Defendant's father was desirous that defendant should remain at home with him, and, in order to induce him to do so, promised that if he remained at home he would make him a deed of the lands in question, and it was finally arranged in March, 1895, that they should work the land together for the following season, and that the father should then convey the land to defendant, and it was in pursuance of this agreement, fully performed on defendant's part, that the deed was executed on the 4th May, 1895. In my opinion, this was sufficient to make defendant a purchaser for value within the meaning of sec. 5 of the Married Woman's Real Estate Act, R. S. O. ch. 169, which provides that "any married woman, under 21 years of age, of sound mind, might on and since the 5th day of May, 1894, and hereafter may, bar her dower in any land by joining with her husband in a deed or conveyance thereof to a purchaser for value.

Action dismissed with costs.

MEREDITH, C.J.

JULY 27TH, 1903.

TRIAL.

UNION BANK OF CANADA v. BRIGHAM.

Equitable Execution—Reaching Share of Judgment Debtor in Estate—Indebtedness of Debtor to Estate — Formation of Company — Assignment of Debtor's Interest — Priority over Claims of Creditors.

The plaintiffs, as judgment creditors of defendant Isaac Reginald Brigham, sought to have it declared that he was cu-

titled to a 35 per cent. share or interest in the lands of Charles James Smith, deceased, and that this share or interest was subject to the payment of the debts of defendant Isaac Reginald Brigham; and to have it also declared that he was not indebted to the testator, and in any event that he was not indebted to defendant company; to have set aside as fraudulent against creditors an assignment dated 4th June, 1901, by Isaac Reginald Brigham to defendant Thomas George Brigham of any interest he might have in the estate of the testator, and an assignment of the like kind to defendants the C. J. Smith Co. (Ltd.), dated 2nd October, 1901, or to have those assignments set aside as fraudulent preferences; and to have sold the interest of defendant Isaac Reginald Brigham in the lands and other property of the testator for payment of plaintiffs' claim; and further relief.

A. B. Aylesworth, K.C., and Travers Lewis, Ottawa, for plaintiffs.

W. Wyld, Ottawa, and Glyn Osler, Ottawa, for defendants.

MEREDITH, C.J., held that the case wholly failed. There was not a tittle of evidence that the formation of the company by the residuary legatees under the will of Charles James Smith and the transfer to the company of the lands of the estate of the surviving executor and trustee, by the direction of the residuary legatees, was a device for preventing, hindering, or delaying plaintiffs or the other creditors of the judgment debtor from obtaining payment of their debts, or that it was anything else than what it purported to be, a bona fide arrangement for the purpose of realizing the residue of the estate to the best advantage. The result of what was done was to vest absolutely in the company the property which was conveyed, and to make the residuary legatees owners of the shares in the company for which they subscribed, in lieu of being owners of the property conveyed. It was not intended that the judgment debtor should be entitled to the shares in the company which represented his interest in the estate, except subject to what, if anything, remained to be deducted from his share in respect of his indebtedness to the estate of the testator. The utmost relief to which the plaintiffs, on a properly framed record, and suing on behalf of themselves and all the other creditors of the judgment debtor, would be entitled, is a judgment setting aside the impeached assignments and declaring that his shares in defendant company, subject to a lien and charge thereon in favour of the other residuary legatees for their proper proportions of what, if anything, remains owing by

him to the estate of the testator, after crediting what was paid on account of his indebtedness at the time of the partial division, is liable to be sold for the satisfaction of the claims of plaintiffs and his other creditors, and the usual provisions consequent on such a declaration and judgment. If plaintiffs so elect and make the necessary amendments on or before 15th September next, there will be judgment for the relief indicated, and there will be no costs to any of the parties up to and inclusive of the trial. If the plaintiffs do not so elect, the action will be dismissed with costs.

MEREDITH, C. J.

JULY 27TH, 1903.

TRIAL.

BOURQUE v. CITY OF OTTAWA.

Municipal Corporations—Contract for Municipal Work—Construction of Contract—Compensation to Contractor for Damage during Progress of Work by Municipal Sewers.

Action for the contract price of certain work done by plaintiff and for damages arising thereout. Two questions remained to be disposed of, all the others having been dealt with during the progress of the trial: (1) The claim of plaintiff for payment of \$18,447.56 alleged to remain unpaid on the contract price of the work. (2) The claim for damages occasioned by the contents of certain city sewers which existed in the streets in which plaintiff was required to build the sewers which he contracted to construct, and the existence of which was not known to and not disclosed to him, flowing into the trenches dug by him and impeding and delaying him in the work and causing him additional expense in the doing of it.

N. A. Belcourt, K.C., for plaintiff.

T. McVeity, Ottawa, for defendants.

MEREDITH, C.J.:—The first claim was based on the proposition that the contract was one for the doing of the whole work, including the rock excavation, for a lump sum of \$127,225, whether the quantity of the excavation turned out to be greater or less than 5,700 cubic yards. In my opinion, such was not the meaning of the contract, but it was a contract to do the whole of the work contracted for except the rock excavation for \$112,975, and the rock excavation, which was estimated at 5,700 cubic yards, for \$2.50 per cubic yard, for the quantity actually taken out.

As to the second claim, the sewers were not private drains, but municipal sewers belonging to defendants, into which

the property owners were required to drain their houses and property, and which carried the drainage of the streets also. It would be most unjust if defendants were permitted to discharge the contents of these sewers into the trenches which plaintiff was required to dig, to his loss and damage, without being liable to make compensation to him for it. Plaintiff is entitled to recover from defendants \$2,810.50, which was the loss he sustained by the acts complained of, as estimated by defendants' own engineer.

MEREDITH, C.J.

JULY 27TH, 1903.

TRIAL.

FARMERS' LOAN AND SAVINGS CO. v. PATCHETT.

Covenant—Assignment of Mortgage—Covenant by Assignor for Payment by Mortgagor—Release of Part of Mortgaged Premises without Consent of Covenantor—Discharge—Inquiry as to Value of Part Released.

Action, as against defendant Coleman, on a covenant entered into by him with plaintiffs on the assignment by him to them of an indenture of mortgage, dated 3rd June, 1889, from defendant Patchett to defendant Coleman, securing payment of \$400 and interest at 7 per cent. per annum, on lot 18 on the west side of Fairview avenue, in the town of Toronto Junction.

W. M. Douglas, K.C., for plaintiffs.

W. H. Irving, for defendant Coleman.

MEREDITH, C.J.:—The assignment was dated 28th June, 1889, and the covenant was that the mortgagor will well and truly pay the mortgage moneys. The mortgagor sold and conveyed the land in separate parcels to one Mills and one Wellwood, subject to the mortgage, which, as each conveyance stated, to the extent of one-half of the mortgage money and interest, formed part of the consideration money for the conveyance. On 27th January, 1891, plaintiffs, without obtaining the consent of defendant Coleman, discharged the south half of the lot from their mortgage, in consideration of the payment of one-half of the principal money and the interest on the one-half of it. This was an alteration of the contract which defendant Coleman had guaranteed, and not an unsubstantial one. It is not open to the Court to enter upon an inquiry as to the value of the part released. Action dismissed with costs.

TEETZEL, J.

JULY 28TH, 1903.

TRIAL.

MORANG v. HOPKINS.

Contract—Preparation of Literary Work—Employment of Editor by Publisher—Right to Literary Materials Collected by Editor.

The plaintiffs were a publishing company, and defendant, J. Castell Hopkins, a professional writer and author. During 1900 defendant and George N. Morang, the plaintiffs' managing director, entered into negotiations for the publication of an "Annual Register of Canadian Affairs," to begin with the first year of the new century, the defendant to be compiler and editor, and plaintiffs the publishers. The idea of the publication was a conception of the defendant, who had spent some time in collecting the necessary literature and statistical matter, and had prepared a draft or skeleton of the first volume. The defendant was also a large subscriber to magazines, and had arranged with the Mail and Empire Publishing Company, on his own account and at his own expense, to get the benefit of all their exchanges for the purpose of the proposed work. The negotiations resulted in an agreement whereby plaintiffs were to pay defendant \$25 per week for his services in compiling and editing the 1901 publication, and plaintiffs were to do the printing, binding, and publishing. The plaintiffs alleged that while the volume for 1901 was going through the press during the first six months of 1902, and while defendant was in their employ, he continued to collect or have furnished to him by plaintiffs a large number of books, papers, and documents similar to those used in the preparation of the 1901 volume, and that such material was collected by defendant as an employee of plaintiffs, and that they were entitled to the benefit of such material, and that not being able to arrange terms with defendant for the further preparation of the 1902 volume, defendant took possession and appropriated to his own use and threatened to use the same material in the preparation and publication of a rival register; and plaintiffs claimed an injunction and damages. Plaintiffs claimed as their property whatever was collected by defendant during his employment by plaintiffs and intended for use in preparation of the Annual Register for 1902.

J. H. Moss and C. A. Moss, for plaintiffs.

A. J. Russell Snow, for defendant.

TEETZEL, J.:—Upon the evidence, defendant was justified in concluding that plaintiffs did not intend to publish

a 1902 edition, and defendant was free to collect material necessary for him as an editor to prepare the volume for that year, and the fact that defendant was in the employment of plaintiffs from 1st January, 1901, to 27th June, 1902, engaged in completing the 1901 register, did not disentitle defendant during that time to collect such material on his own account and to store it temporarily on plaintiffs' premises, and to take it away with him at the end of his engagement, provided he did not take away any material belonging to plaintiffs. I find that before action defendant returned to plaintiffs all material to which they were entitled, and defendant was at liberty to make a contract with another publisher for the publication of a register for 1902, and to use in connection therewith any material collected by him for that year except the material already returned to plaintiffs. If defendant had been employed to make even preliminary preparations for the 1902 edition, and had in pursuance thereof collected the material, defendant could be restrained from using such material to his own advantage or against the interest of his former employer: *Lamb v. Evans*, [1893] 1 Ch. 218; but, in view of the facts found, that case is not applicable here; and defendant was free to equip himself as an editor to prepare for publication of the 1902 edition, either in anticipation of a possible new arrangement with plaintiffs or with a view of exploiting the project with another publisher. Action dismissed with costs.

TEETZEL, J.

JULY 28TH, 1903.

TRIAL.

MANLEY v. ROGERS.

Ship—Vessels Moored to Dock—Negligent Fastening—Damage by One to Another—Inevitable Accident.

Plaintiffs were the owners of the tug "Mizpah," and defendants were the owners of a steam dredge with scows, etc. On 27th October, 1902, plaintiffs had their tug anchored, and also moored to the east dock, in the harbour at Meaford, where defendants were operating their plant; defendants had also moored to the same dock, a short distance to the north of plaintiffs' tug, one of their scows, and to this, along its outer side, another scow of defendants was fastened. During the early hours of the morning of the 28th, the force of the wind and sea parted the bow lines of these scows, and caused them to swing around westerly in the direction of plaintiffs' tug. Plaintiffs alleged that defendants so negligently and carelessly moored and fastened their scows that the lines broke, allowing the scows to swing around and strike the tug, forc-

ing it with such violence against the dock as to cause it to spring a leak and sink, causing damage to the tug, its equipment, etc.; and sought to recover damages therefor.

R. C. Clute, K.C., and J. S. Wilson, Meaford, for plaintiffs.

W. M. German, K.C., and G. H. Petit, Welland, for defendants.

TEETZEL, J.: — The evidence as to the position of the scows when they were first seen after they broke away, and what happened when getting them in place, together with the marks on the dock and tug, satisfy me that the tug was sunk as a result of being violently struck by the scows, or one of them, causing her bow-lines to break, and allowing her to swing around and bump her stern against the dock. I find that the tug was well moored in a place of safety, and no fault whatever could be attributed to plaintiffs; that the scows were moored between the tug and the mouth of the harbour in such a situation that in the event of their breaking away they would, in view of their great weight, be likely to do serious injury to the tug or other craft in the upper part of the harbour; that, while the scows were safely moored, as against ordinary contingencies in mild weather, the threatening storm with high wind on the 27th, blowing over a wide stretch of open water directly into the harbour, and from a quarter which bore most heavily upon the scows, which stood several feet above the water (of all of which defendants' captain in charge had notice), made it necessary to strengthen the moorings, and, while the captain gave directions to have this done, it was not done, and the scows were not properly fastened, and by reason thereof broke away and caused the damage complained of; that the injury was not caused by sudden, unforeseen, and uncontrollable circumstances, or inevitable accident; and that the occurrence could have been prevented by the exercise of ordinary care, caution, and maritime skill by defendants. In a case of this kind, to constitute inevitable accident, it is necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by the exercise of ordinary care, &c.: see *The Marapesia*, L. R. 4 P. C. 212; *Marsden's Law of Collisions at Sea*, pp. 7 and 8, and cases there cited. Judgment for plaintiffs for \$600 with costs.

MEREDITH, C.J.

JULY 29TH, 1903.

TRIAL.

ROBB v. SAMIS.

Vendor and Purchaser—Action by Purchaser for Rescission of Sale of Land—Misrepresentations—Knowledge of Purchaser—Evidence as to Falsity of Statements—Statements Made in Good Faith—Deceit—Damages.

Action to set aside the purchase alleged to have been made by plaintiff from defendants of an oil property in the county of Lambton for \$14,000, and to recover the purchase money paid, on the ground that plaintiff was induced to make the purchase by untrue representations of defendants as to the nature and condition of the property and the quantity of oil which it had produced and was then producing, or to recover damages for false and fraudulent representations. The agreement for the purchase was in writing, and was dated the 1st October, 1902. The purchasers named in it were plaintiff and G. A. McGillivray & Co. The purchase was completed about the 23rd October, 1902, by a conveyance to plaintiff "in trust." The representations which plaintiff alleged were untrue were contained in the following letter:—"Sarnia, Ont., Aug. 25th, 1902. G. A. McGillivray, Esq., Petrolia. Dear sir: Replying to yours of 23rd re Marthaville property; this property consists of 103 acres and about 60 wells, averaging about 160 barrels per month. The pumping rig and equipment throughout are among the best in the territory and installed by us with a view of developing the whole place, as there is room for double the number of wells. But Mr. Mackenzie's death, necessitating the winding-up of his estate, has deterred us from developing. The extensive gravel deposit on the lot is a considerable factor in the earnings of the property; also pasturage brings in about \$100 per season, as there is abundance of water there all the year round. The property is inexpensive to run, as there is gas connection from the wells to the furnace, supplying about half of the fuel, also pipe connections to the Tanking Co., avoiding all teaming of oil. The production holds very steady, having reached the fixed minimum. Our price for the property, including horse and tools and casing, pumps, etc., on the place, is \$15,000 net, and open only for immediate acceptance, as other buyers are inquiring about it. Yours truly, C. Mackenzie & Co., per Geo. S. Samis." The alleged misrepresentations of which plaintiff complained were: (1) That the wells averaged about 160 barrels per month; (2) that the equipment of the property was in a good state of repair; (3) that the gas supply furnished one-half the fuel consumed on the property; (4) that the production of

oil had reached a fixed minimum; (5) that the production held very steady.

W. R. Riddell, K.C., and I. Greenizen, Petrolia, for plaintiff.

A. B. Aylesworth, K.C., and W. R. P. Parker, for defendants.

MEREDITH, C.J.:—In dealing with the case it must not be treated as one in which the purchaser was ignorant of the nature of the property for the purchase of which he was negotiating. McGillivray, who was associated with plaintiff in the purchase, was well acquainted with the business of producing oil and with oil lands, and knew the property about which he and plaintiff were negotiating. The statement that the property consisted of 103 acres and about 60 wells averaging about 160 barrels per month, does not mean that the actual production in each month had been about that quantity; the statement was not untrue if the wells were capable of producing a quantity of oil averaging about 160 barrels per month, but, owing to leaks and shutting down for repairs or other causes, that quantity had not been or was not then being produced. The actual production for the twelve months preceding that in which the letter was written was at the rate of almost 152 barrels per month, and if the period were carried back three months further, the average per month would be within a small fraction of 160 barrels per month. The statement as to the average production was, therefore, not untrue in fact, but if it was, it was honestly made and without any intent to deceive, and not recklessly, and it would, therefore, form no ground for an action of deceit, nor is there ground for rescission, as plaintiff, after knowledge of the untruth, and with his eyes open, went on and completed the purchase. Statements (4) and (5) also were not untrue in the sense in which they were made and understood by plaintiff and McGillivray. The untruth of the statement as to the condition of the equipment, if such a statement in respect of it as is alleged had been made, which is not proved, is not supported by the evidence, and, even if it had not been in a good state of repair, plaintiff saw the condition in which it was, before making his bargain. Statement (3) was made by defendants in good faith and under the belief that it was true, and not recklessly, and plaintiff has not satisfactorily shewn that it was untrue in fact. It is not what the condition of things has been since the purchase that is to be looked at. The question is, did the letter correctly state the condition as it existed at the date thereof? The fact that since plaintiff has been in possession the gas

supply has furnished but a comparatively small part of the fuel consumed is a circumstance to be considered, more. Action dismissed with costs.

BRITTON, J.

JULY 30th

TRIAL.

MCDONALD v. McDONALD.

Deed — Action to Set aside Conveyance of Land — Disputed Execution by Person since Deceased—Conflicting Evidence

Action to set aside and remove from the registry a legal conveyance of 42 acres of the north half of lot 21 on the east side of Point Ann lane, township of Thurlow. The instrument impeached by the plaintiff on the 18th July, 1902, and purported to have been made by George McDonald in consideration of natural love and affection and one dollar, to his son Donald McDonald, defendant. George McDonald made his will on 13th February, 1903, devising this land to his daughter Jane for life, remainder to all his children equally. He died on 18th February, 1903. At the time he made his will he purported to have thought himself the owner of this land. It was not shewn that he had lost his memory or that he was incapable of doing business. The duplicate of the instrument of conveyance, produced from the registry office, had no seal upon it, and its appearance indicated that it never had a seal. The original, when produced in court by the defendant, had a mark indicating that a small seal had some time or other been attached, but not opposite to where the name of the donor was written. Defendant and his solicitor both swore to the existence of seals upon both documents at the time of execution. The execution purported to be by Donald McDonald as a marksman, his name being written by defendant's solicitor. The evidence as to deceased being at the registry office in Belleville on the day sworn to by defendant was conflicting.

A. B. Aylesworth, K.C., for plaintiffs.

E. G. Porter, Belleville, for defendant.

BRITTON, J., held, that, as the solicitor and the defendant had given their evidence in the most positive way, that the due execution of the deed by the deceased on the day of date, they could not be mistaken, and the deed was affirmed unless the Court could find the solicitor and defendant guilty of conspiracy, forgery, and perjury, as the witnesses for plaintiffs who spoke of the execution of the 18th July might possibly be mistaken. Action dismissed without costs.

JULY 30TH, 1903.

DIVISIONAL COURT.

ROGERS v. TOWN OF PETROLIA..

Way — Bridge across Ditch — Defective Condition — Misfeasance — Nuisance—Injury to Person Using Highway.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., dismissing an action brought by husband and wife to recover damages for personal injuries to the wife on the 4th January, 1901, by reason of alleged negligence of defendants in regard to the condition of North street, in the town, near the intersection of Sadie street. Along the northerly side of North street there was a ditch and a small bridge or means of crossing it. It was charged that this bridge or crossing was provided by defendants, and that it was so negligently constructed and so out of repair that it broke down when the wife stepped upon it, and that she fell and sustained severe injuries. Plaintiffs thus placed the claim upon the neglect of defendants to keep the street in proper repair pursuant to the statutory obligation. It appeared, however, at the trial, that the notice required by statute to be given to defendants had not been given, and that the action had not been brought within three months after the accident, as required by statute. The statement of claim also charged that defendants made large excavations and ditches at the place where the accident happened, and the said excavations and ditches were so negligently made and improperly protected, and the bridge or crossing was so negligently and insufficiently constructed and kept in repair by defendants, that the wife, by reason of the said acts and negligence of defendants, fell through the bridge or crossing, when lawfully using the same, into the ditch, and sustained severe injuries, etc.—thus charging defendants with having constructed the drain and neglected to provide a proper bridge or crossing over it for the safety and convenience of the public, and permitting the same to be so out of repair that it constituted a nuisance on the highway and was dangerous to the public.

The appeal was heard by MEREDITH, C.J., and FERGUSON, J.

A. B. Aylesworth, K.C., for plaintiffs.

G. F. Shepley, K.C., for defendants.

FERGUSON, J.:—If plaintiffs were right in making this charge against defendants and should prove their allegations, they could succeed in the action, notwithstanding the

statutory provisions requiring notice and limiting the time for bringing the action: *Bathurst v. McPherson*, 4 App. Cas. 256; *Sydney v. Bourke*, [1895] A. C. 403. There was evidence that it was not defendants, but plaintiffs' predecessor in the occupation of their dwelling, who put the bridge over the ditch. The bridge consisted of a couple of inch boards laid upon and nailed to a scantling on each side of the ditch, which was $2\frac{1}{2}$ or 3 feet deep. There was evidence that employees of defendants cleaned out the ditch at the proper season of the year more than once, and while so engaged took up and relaid the little bridge. There was no evidence that defendants actually excavated or dug the ditch. It cannot be found on the evidence that defendants by their acts created a nuisance on the street and neglected to take proper care of it. No act of misfeasance was shewn for which defendants can be held responsible.

MEREDITH, C.J., agreed with the opinion of Ferguson, J., and was also of opinion that the defective condition of the bridge, and not the ditch, was the proximate cause of the injury. It was unnecessary to determine whether the limitation provision of sec. 606 (1) of the Municipal Act is applicable to a liability arising from misfeasance of defendants. See *McGregor v. Harwich*, 29 S. C. R. at p. 144; *Rowe v. Leeds and Grenville*, 13 C. P. 515.

Appeal dismissed with costs.

MEREDITH, J.

JULY 31st, 1903.

CHAMBERS.

REX v. GILMORE.

Criminal Law—Prosecution for Crime—Right of Private Prosecutor to Take Part in Proceedings.

W. H. Bartram, London, for the private prosecutor, moved *ex parte* for a certiorari.

MEREDITH, J.:—The accused was charged with the crime of perjury. The private prosecutor was anxious to conduct, or that counsel retained by her should aid in the conduct of, the prosecution. Neither party desired or was willing that this should be done. The proper Crown officer undertook, for the King, the prosecution, and, as the applicant alleged, refused to allow other counsel to conduct, or take part in the conduct of, the prosecution. This motion was launched for the purpose of having the prosecutor's wishes given effect to.

Although it is the right of everyone to make a complaint with a view to the institution of criminal proceedings, and also, under certain circumstances, to prefer a bill of indictment, yet the prosecutor is no party to the prosecution, nor, indeed, bound by any judgment that may be made in it. He may, with the consent of the proper authorities, proceed in the name of the Sovereign; but against the will of both parties he has no power over, or voice in, the proceedings. For these reasons, apart from any others, the motion is dismissed.

MEREDITH, J.

JULY 31ST, 1903.

CHAMBERS.

RE BRAY.

Will—Legacies—Mortmain and Charitable Uses Act.

Motion by executors under Rule 938 for an order declaring the construction of a will.

MEREDITH, J.:—The sole question was whether two legacies were made void by the mortmain and charitable uses enactments. They were not made void, but were removed from the effect of such laws by the Mortmain and Charitable Uses Act, R. S. O. 1897 ch. 12—see sec. 8—to which enactment the restrictions of part 2 of the Mortmain and Charitable Uses Act, 1902, 2 Edw. VII. ch. 2 (O.), and R. S. O. 1897 ch. 333, are expressly made subject—see sec. 7. The legatees are entitled to the legacies. Costs out of the fund in the usual way.

MEREDITH, J.

JULY 31ST, 1903

CHAMBERS.

RE BRADLEY.

Devolution of Estates Act—Sale of Lands by Administrator—Inaccessibility of Heirs-at-Law—Consent of Official Guardian—Inquiries.

Motion under Rule 972 for a direction to the official guardian to approve of a sale of certain lands made by the applicant as administrator of his deceased brother's estate.

T. G. Meredith, K.C., for the applicant.

F. W. Harcourt, official guardian.

MEREDITH, J.:—The heirs-at-law are the brothers and sisters and nephews and nieces, and none of them is under any disability, but some of them are not easily accessible. The sale was made for the purpose of distributing the

estate. There are practically no debts. . . . The approval is required by sec. 16 of the Devolution of Estates Act, as amended by 63 Vict. ch. 17, sec. 17 (O.) . . . Where there are heirs or devisees not competent to concur, or competent to concur but who do not, the approval must be had. . . . This is a case in which the concurrence of all has not yet been sought, because of the delay and expense which that would cause. . . . On the facts of this particular case the proper course to be now pursued is for the official guardian to make the usual inquiries, and if no good reasons are advanced or discovered for withholding his approval, it should be given. Costs out of estate.

MEREDITH, J.

JULY 31st, 1903.

WEEKLY COURT.

RE CANADIAN PACIFIC R. W. CO. AND ASSELIN.

Receiver—Equitable Execution—Property Sought to be Reached—Business Debts—Shares in Foreign Corporation—Life Insurance Policy.

Motion by Oscar Asselin, claimant in a carriers' interpleader, under sec. 58, sub-sec. 9, of the O. J. Act, for an order appointing him receiver of the estate of one Cleg-horn, against whom he had recovered judgment in the interpleader proceedings, for the purpose of realizing his debt.

W. J. Elliott, for the applicant.

W. N. Tilley, for the judgment debtor.

MEREDITH, J.:—The applicant's claim is, in effect, that he be appointed a sort of general assignee, for his own benefit only, of substantially all his debtor's property and earnings, and that the debtor be obliged to carry on business so that the applicant may have the earnings until his debt is satisfied. . . . The provision of the Judicature Act that a receiver may be appointed in all cases in which it shall appear to the Court to be just and convenient that such an order should be made, was intended, so far as it applies to such a case as this, merely to expressly confer upon all the Courts that jurisdiction which, under the designation of equitable execution, had before the fusion of law and equity been exercised by the Court of Chancery alone. See *Harris v. Beauchamp*, [1894] 1 Q. B.

801; *O'Donnell v. Faulkner*, 1 O. L. R. 21; *Central Bank v. Ellis*, 27 O. R. 583; *In re Harrison and Bottomley*, [1899] 1 Ch. 465.

Of the three classes of property specially aimed at by this application, none can be reached by that mode of enforcing debts. What is sought as to debts due and that may become due to the debtor is virtually an assignment of them to the creditor for his own use until his debt shall be paid. The enactment gives no such right. The debt sought to be reached must be a specific one, and if one which can be reached by attachment, the ordinary remedy must be adopted. See *Harris v. Beauchamp*, *supra*.

Nor can capital stock in a foreign corporation be so reached; there is no means by which a sale and transfer of it could be enforced.

As to the life assurance contract, the weight of argument and of judicial opinion is also against the applicant. It is not a fully paid up policy. No means of meeting the premiums is suggested. It is not shewn that the underwriters would or could be compelled to accept the premiums from the applicant if he were willing to pay them. To give effect to the application might be but to avoid the policy. It can hardly be convenient or just that that should be done or risked. See *Alleyne v. Davcy*, 5 Ir. Ch. 56; *Re Sargeant's Trusts*, 7 L. R. Ir. 66; *Canadian Mutual L. and I. Co. v. Nisbet*, 31 O. R. 562; *Weeks v. Frawley*, 23 O. R. 235.

The Court will not appoint a receiver where the effect may be merely the loss of the property or right; nor will a receiver be appointed unless it be reasonably clear that benefit will be derived from the appointment. See *Hamilton v. Brogden*, [1891] W. N. 36, 33 Sol. J. 206; *O'Donovan v. Goggin*, 30 L. R. Ir. 579; *I. v. K.*, W. N. 1884, p. 63; *Manchester v. Parkinson*, 22 Q. B. D. 173. The policy cannot be considered to come within the meaning of the words "any money or bank notes . . . and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money," contained in sec. 18 of the Execution Act. It is not of the same nature as those mentioned, even if it can in any sense be deemed a security for money.

Application refused, with costs to be set off against the judgment.

TEETZEL, J.

JULY 31ST, 1903.

TRIAL.

HOEFFLER v. IRWIN.

Partnership—Oral Contract—Purchase and Sale of Timber Limits—Interest in Land—Statute of Frauds—Part Performance—Finding of Jury.

Plaintiff, alleging that he was a partner of defendant, sued for one-half of a one-third interest in the profits realized by defendant in the purchase and sale of certain timber limits in the township of Merritt. Plaintiff alleged an oral agreement. Defendant denied the agreement, and pleaded the Statute of Frauds. Before action defendant realized a profit on the sale of the limits, and if plaintiff were entitled to share therein the amount would be \$2,392.35. The question whether the oral agreement was made was submitted to the jury, who found in favour of plaintiff's contention.

W. H. Hearst, Sault Ste. Marie, for defendant, asked for a nonsuit, contending that the agreement was one respecting an interest in land, citing *Handy v. Carruthers*, 25 O. R. 279; *McNeil v. Haines*, 17 O. R. 479.

J. H. Clary, Sudbury, for plaintiff, cited *Archibald v. McNerhanie*, 29 S. C. R. 564.

TEETZEL, J., without deciding whether the agreement in this case was governed by either of the authorities cited, held that, the jury having found the agreement as contended for by plaintiff, there was such a part performance on the part of plaintiff as would entitle him to compel defendants to carry out the agreement on his part. Judgment for plaintiff for \$2,392.85 with costs.

TEETZEL, J.

JULY 31ST, 1903.

TRIAL.

TAYLOR v. CONLON.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Defects in Machinery of Mill—Contributory Negligence.

Action under the Workmen's Compensation for Injuries Act for damages for injuries sustained by plaintiff while in the employment of defendants in their saw mill in the district of Manitoulin.

A. J. Keeler, for plaintiff.

A. G. Murray, Gore Bay, for defendants.

TEETZEL, J.:—Plaintiff was employed as a general labourer, with the particular duty of keeping the boiler supplied with fuel. Among the machinery in the mill was a circular rip saw fixed in a table. This saw was operated by a belt connecting a mandrill on the saw-shaft with a pulley on a counter-shaft, and on the counter-shaft was a split pulley, one-half slack and the other fixed, and this was connected by a belt with a pulley on the main shaft. On 6th June, 1901, while plaintiff was attempting to rip a strip off a piece of board about six inches wide by two and a-half feet long, his left hand came in contact with the saw, resulting in the loss of two fingers. The plaintiff alleged as defects in the machinery, the absence of a guard or hood over the saw; that the belt connecting the counter-shaft with the main shaft did not fit properly; and the absence of a guide to prevent the belt slipping from the tight to the loose pulley and vice versa. . . . A guard or hood enclosing the upper part of the saw was not practicable without great inconvenience and delay in operating the saw. The guide described in the evidence as a "strap guide" was not a necessary and reasonable device that defendants were bound to attach. . . . The slipping of the belt did not endanger the operator, assuming that he possessed ordinary knowledge and skill in using the saw, and it did not in fact induce plaintiff's injury.

But, even if these defects were proved, plaintiff must fail on the ground of contributory negligence. He was not employed to operate the saw and was not experienced at that work; his attempt to operate it on this occasion was purely voluntary, though he had not been forbidden to use it; he should have used the guide or fence, instead of attempting to guide the board with his left hand; trying to saw a short and narrow piece of board without the guide was an unskilful and careless act, and was the proximate cause of his misfortune, which could have been avoided by the exercise of ordinary care on his part.

Action dismissed with costs.

TEETZEL, J.

JULY 31ST, 1903.

TRIAL.

LAFAVE v. LAKE SUPERIOR POWER CO.

Landlord and Tenant—Mining Lease—Reservation of Rents—Royalties—Implied Condition as to Commencement of Mining Operations—Costs.

Action to recover rents under a mining lease from plaintiffs to defendants. The lease was dated 16th August, 1902, and made in pursuance of the Act respecting short

forms of leases. By it plaintiffs granted and demised to defendants the lands therein described for five years, with exclusive and very full powers to carry on mining operations. Defendants covenanted to pay plaintiffs for the use of the lands, by way of rent therefor, certain specified sums per ton as royalty according to the grade of ore taken from the lands. The defendants also covenanted that the combined royalties should amount to at least \$60 per month for the first four months of the lease, and at least \$75 per month ever after during the currency of the lease or any renewal thereof, and agreed to pay the lessors the said sum per month, whether or not the royalties on the ore mined should amount to so much, provided, however, that if in any month or months the royalties should be deficient and not amount to the payment reserved, and in the succeeding month or months the royalties should be in excess of the reserved payment, such excess and so much thereof as should be necessary to make good such deficiency might be retained by the lessees until such deficiency should be reimbursed to the lessees in full. No mining whatever had been done upon the lands.

J. H. Clary, Sudbury, for plaintiffs.

J. E. Irving, Sault Ste. Marie, for defendants, contended that they were not liable to pay rent or royalty unless mining operations were actually carried on upon the premises.

TEETZEL, J.:—Such a condition is not to be inferred. The covenants entered into by defendants as to payment of the minimum rent each month are plain and unequivocal, and not subject to any condition express or implied. *Palmer v. Wallbridge*, 15 S. C. R. 650, applied and followed. The amount in question being within the jurisdiction of the District Court, and all rents accrued having been paid after action brought, the costs should be limited. Judgment for plaintiffs for \$40 costs without any right of set-off.

MEREDITH, J.

JULY 31st, 1903.

TRIAL.

BRADLEY v. GANANOQUE, ETC., CO.

Water and Watercourses—Injury to Lands by Overflow of Water—Dam—Flood Gates—Negligence—Cause of Injury.

Each of the numerous plaintiffs sued in respect of an entirely separate and independent cause of action, but all of them alleged that each cause of action arose from the one wrong of defendants. The claims were for damages for injury to growing crops by backing flood waters over plaintiffs' land. These lands were naturally low lying, and so

situated that they must be more or less affected by flood waters at certain seasons. Defendants' right to maintain their dam at its present height was not disputed. Plaintiffs rested their case upon a judgment in a former action by which it was considered, in effect, that defendants had the right to so maintain it except during freshets and periods of overflow of the dam, and that at such periods it was the duty of defendants, by means of proper waste gates, to lower the water to the level of the dam with reasonable expedition. There was no complaint that the height of the dam exceeded that provided for in the judgment. What was complained of was, that defendants did not during the spring freshet of 1901, by means of proper flood gates, lower the waters to the level of the dam with reasonable expedition. The only questions were: (1) Have defendants been guilty of a breach of their duty in this respect—have they been guilty of negligence? (2) Was such negligence the cause of plaintiffs' injury?

R. T. Walkem, K.C., and G. F. Shepley, K.C., for plaintiffs.

G. H. Watson, K.C., and W. B. Carroll, Gananoque, for defendants.

MEREDITH, J.:—The onus of proof is on plaintiffs, and they fail on both branches.

There is no contention that at the time in question defendants failed to take usual care, the usual means for expeditiously lowering the water; there is no evidence in support of such a contention, if made. Then ever since the judgment, now 16 years, with no greater care taken, there has never but once before been any complaint such as that now in question. Upon that other occasion the defendants paid some comparatively small amount, saying, as plaintiffs now assert, that they had that year employed a new caretaker, and that possibly through his inexperience some injury might have been caused, but, as defendants now assert, merely to buy peace. When for fourteen years the like course has been pursued without injury, without complaint, it can hardly be said that defendants were negligent in following in the old footsteps.

After extraordinary efforts to make a case against defendants, the most that the expert witnesses for plaintiffs have been able to say was that, in their opinion, if another flood gate were made in the dam, and if the gates were opened for a greater length of time before floods, plaintiffs would have been saved some of the flooding from which their low lying lands suffered.

Against that opinion an equal, if not greater, array of professional gentlemen, with more positiveness, asserted that such means would be useless, and any more gates a source of great danger to the structure.

In these circumstances, how can anyone say that defendants were guilty of negligence? . . .

Upon the whole evidence, my finding, if necessary, is that the precautions suggested by plaintiffs' witnesses would not have saved plaintiffs from the losses they sustained to any appreciable extent. But, if it could be found that the weight of opinion or argument was with plaintiffs, how can it be said that defendants were guilty of negligence in not discovering and adopting such expedients, in a case where for so many years their own plan worked satisfactorily?

There seems to me to be no doubt, upon the whole evidence, that plaintiffs' losses in the year in question are not appreciably attributable to defendants, but were caused by heavy and repeated or long continued floods, and the exceedingly wet weather following them; and this is borne out by the fact that like losses were sustained by other farmers whose lands were not so low lying and are situated so that they would not have been affected by the defendants' dam.

A lesser branch of plaintiffs' claim is the complaint that defendants put a temporary dam across the stream above the dam in question, to enable them to repair the latter, and that they left part of the temporary structure there, and that it had to some extent caused the plaintiffs damage by holding the water back too long upon their lands.

There is really nothing substantial in this claim. The plaintiffs' witness who knew most about the matter, because he had worked on the temporary dam and helped in its removal when the work of repair was finished, long before the flood which injured plaintiffs, said that there was a small quantity of brush and some loose gravel that was not or may not have been removed. But it is very plain that that would not pen back any great body of water, but would be swept away, if any real obstruction, at the first rush of the flood. So that it was no matter of surprise to hear the testimony of the witnesses for the defence that after a very careful search they were unable to find any such obstructions or any part of the temporary structure now remaining.

The plaintiffs' case wholly fails, and must be dismissed, and dismissed with costs, if defendants ask costs.

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MEREDITH, C. J.

JULY 31st, 1903.

TRIAL.

CITY OF OTTAWA v. OTTAWA ELECTRIC R. W. CO.

Street Railway—Contract with Municipal Corporation—Removal of Snow—Repairs to Pavements.

Action to recover moneys expended by plaintiffs for the removal of snow and repairs to pavements, under an agreement between the parties. It was conceded at the trial that plaintiffs were entitled to recover in respect of the claim for the cost of the removal of snow, and judgment was given for plaintiffs for \$79.42, the amount of that claim.

The other claim was for the cost of repairs made by plaintiffs to the permanent pavements on certain streets of the city of Ottawa on which defendants' railway ran, which, it was alleged, were rendered necessary in consequence of defendants having wrongfully broken up the pavement in order to make repairs to their tracks, and having failed to restore it to its original condition when the repairs were completed, and for the cost of repairs to the asphalt pavement on certain other of such streets, which, it was alleged, were rendered necessary in consequence of defendants having broken up the pavement in order to substitute other rails for those which had been laid down, and having repaired the pavement, not with asphalt, but another kind of paving material of an inferior kind and less durable.

T. McVeity, Ottawa, for plaintiffs.

F. H. Chrysler, K.C., for defendants.

MEREDITH, C.J.:—With regard to the latter branch of the second claim, I find that the material with which the repairs were made was used with the approval and consent of plaintiffs, and plaintiffs are not therefore entitled to re-

cover. Upon the first branch of the second claim, I find that under the agreement between the parties asphalt pavements were laid by plaintiffs on the streets in question from curb to curb, including that part of the streets occupied by the railway; that in constructing these pavements plaintiffs failed to "tamp" the concrete under the rails, as they should have done, in consequence of which, in order to make the rails firm and to prevent their springing, owing to the concrete bed upon which they were laid being improperly and insufficiently made by defendants, it became necessary for the defendants to break up the pavement, in order, by "shimming" the rails, to remedy the defect in the concrete bed. . . . It was not contended that defendants broke up more of the pavements than was necessary to enable them to remedy the condition of the rails, caused by the negligence and breach of duty of plaintiffs, or that what was done by them was done negligently. Had defendants restored the pavements to their original condition at their own cost, they could have recovered from plaintiffs the expense they would have been put to, and it follows that plaintiffs are not entitled to recover from defendants the cost of these repairs. Second claim dismissed. No costs to either party.

MEREDITH, C.J.

JULY 31ST, 1903.

TRIAL.

RAMSAY v. REID.

Will—Legacy—Discretion of Executors as to Payment—Vested Interest—Right of Legatee—Payment at Majority—Action against Executors—Adding Parties—Persons Interested in Fund.

Plaintiff sued defendants, who were the executors of his father's will, for a declaration as to his rights under the will and to recover \$1,000 and interest. The plaintiff based his claim upon the following paragraph of the will: "I direct that my executors shall sell the north half of lot 22 in the 14th concession of the said township of Sombra to the best advantage possible, and from the proceeds thereof pay over to my son John Grant Ramsay \$1,000 at such times and in such amounts as may seem to them expedient, any portion of the said \$1,000 not so paid over to remain on deposit with . . . until so required to be paid over."

A. Weir, Sarnia, for plaintiff.

A. B. Aylesworth, K.C., and F. W. Kittermaster, Sarnia, for defendants.

MEREDITH, C.J.:—Defendants, acting in good faith and in the exercise of what they claim to be the discretion vested in them by the will, have thought it expedient to pay to plaintiff, though he is of age, only a small part of the \$1,000; and, in my opinion, they have acted wisely if they have the discretion. It was, however, argued that, being of age, the plaintiff is now entitled to payment of the whole \$1,000 and interest, and that the direction of the will as to the time and manner of payment is to be disregarded: *Saunders v. Vautier*, 4 Beav. 115; *Wharton v. Masterman*, [1895] A. C. 186. . . . The persons who would at the death of plaintiff be entitled, if this contention is not upheld, to so much of the fund as the executors do not in the exercise of their discretion pay to plaintiff, should have an opportunity of being heard in opposition to plaintiff's claim, and the case should stand over, with leave to plaintiff to amend by adding the necessary parties. If he desires to amend, he must do so on or before 15th September next; if he elects not to avail himself of the leave, the action will be dismissed with costs. The official guardian to intervene and make inquiry into the mental condition of plaintiff, and report as to his capacity to act for himself, and all proceedings to be stayed on and from 15th September next until further order.

ROSE, J.

AUGUST 23RD, 1898.

WEEKLY COURT.

RE McQUESTEN AND TORONTO, HAMILTON, AND
BUFFALO R. W. CO.

Railway—Lands Injuriouslly Affected—Right to Compensation—Operation of Railway—Sentimental Grievance.

An appeal by the land owner, under the Railway Act of Canada, from an award of arbitrators in respect of compensation for land injuriously affected.

W. A. Logie, Hamilton, for the appellant.

D'Arcy Tate, Hamilton, for the company.

ROSE, J.—It was apparent upon the argument that I could not interfere with the finding of fact by the majority of the arbitrators to the effect that the property had its greatest value in being used as a whole, without a row of lots being taken off to face on Hunter street, and that taking off such a row of lots would lessen the value far more than any sum which could be obtained from the sale of the lots.

No land was taken by the company; no way of access was interfered with; no evidence of injury to the land itself by vibration or the like, was offered.

The ground of complaint in respect of which damages were sought, is put by Mr. Bell, the dissenting arbitrator, as follows: "Though the owner made no use of the Hunter street front before the railway, she was at liberty to do so at any time, and a high class residence such as the owner's would be depreciated by the disfigurement of any of the three streets. In this case there was a verandah on the Hunter street front for the use of the occupants of the dwelling."

Mr. Snider, Judge of the County Court of the county of Wentworth, one of the arbitrators, states the facts, and says: "It is, therefore, not the cutting they have done that does injury, but the cutting they have not done; the fact that they have left the south side, some eighteen feet of it in width, at or near the old and higher level, makes the street unsightly, though the rise from one level to the other is so well-sloped as to do away with any real danger or inconvenience. If the lots at the rear of the property in question were fronting on Hunter street, the unusual appearance of this structural peculiarity would injure their selling value, in my opinion."

Upon this state of facts, I cannot distinguish the case in question in principle from that of *Powell v. Toronto, Hamilton, and Buffalo R. W. Co.*, 25 A. R. 209.

It was urged upon me that the decision in that case did not overrule the case of *Re Birely and Toronto, Hamilton, and Buffalo R. W. Co.*, 28 O. R. 468. That case is referred to by Mr. Justice Osler as follows: "I do not dwell upon the decision in the case of *Birely v. Toronto, Hamilton, and Buffalo R. W. Co.*, 28 O. R. 468, because, although damages appear to have been awarded there in respect of the operation of the railway, the nature of such damages is not disclosed by the report."

That learned Judge was apparently of the opinion that damage might arise from the operation of the railway which would cause actual injury or damage to the land, and be the subject of compensation; but the case before him did not call for any decision of that question, nor does this case now before me, the claim, as I have pointed out, for compensation being for injury to the land arising from what may be called a sentimental grievance, namely, an unsightly road or way adjoining the land on Hunter street.

However hard the case may be for the land owner here, I am unable to find any principle of law upon which I can interfere, and the appeal must be dismissed with costs.

I stay proceedings upon this order for thirty days to enable the parties to appeal if so advised.

ROSE, J.

AUGUST 23RD, 1898.

WEEKLY COURT.

RE MACDONALD AND TORONTO, HAMILTON, AND
BUFFALO R. W. CO.

Railway—Lands Injuriously Affected—Right to Compensation—Operation of Railway—Alterations in Street—Interference with Access—Injury from "Smoke, Noise, Vibration, and Bustle."

An appeal by the company, under the Railway Act of Canada, from an award of compensation for lands injuriously affected by the railway.

D'Arcy Tate, Hamilton, for the appellants.

C. Robinson, Q.C., and James Chisholm, Hamilton, for the land owners.

ROSE, J.—I have already expressed an opinion as to the effect of the decision in the cases of Powell and Birely against this company in the judgment I have delivered in *Re McQueen* and this same company (*supra*). Referring to the opinion I have there expressed, and the grounds for such opinion, I do not see how I can interfere with the finding of the arbitrators on the facts which awarded \$500 for damage which the lands were found to have suffered "from alterations and changes made by the said company in and along and adjoining Hunter street," as it is quite possible upon the evidence that this finding is based upon injury to the land from interference with the way of access, and so is supported by the authorities.

The next finding, however, I think may not be sustained in its present form. It is as follows: "And we, the said Colin G. Snider and the said William Bell, do hereby further order, award, and adjudge that the said lands have suffered and may suffer from the said operation of the railway from smoke, noise, vibration, and bustle to the extent of \$4,500, which amount we award and adjudge in respect of the matters hereinbefore last mentioned."

As the decision in the Birely case is not interfered with by the decision in the Powell case, for the reasons which I have already pointed out, I think that a finding in the terms of the award for damage from vibration I could not interfere with; but I do not see how an award for damage arising from "smoke," "noise," and "bustle" can be supported.

I think that there must be a reference back to the arbitrators to eliminate from their award any damages arising from any of these three causes, that is smoke, noise, or bustle, and that the award must be confined to damage to the land from vibration.

I think that there should be no costs of this motion. Proceedings upon this order will also be stayed for thirty days, to enable the parties to appeal if so advised.

[There was no appeal from this judgment, and the arbitrators upon the reference back reduced the item of \$4,500 to \$500. From this part of the award, viz., the award of \$500 for vibration, the company appealed to the Court of Appeal. The appeal was heard on the 30th May, 1899, by OSLER, MACLENNAN, MOSS, and LISTER, JJ.A. On the 29th June, 1899, the Court dismissed the appeal with costs, holding that, as the matters raised by the appeal were covered by the judgment of ROSE, J., the Court had no right to interfere.]

AUGUST 4TH, 1903.

DIVISIONAL COURT.

HUNTER v. BOYD.

Malicious Prosecution—Reasonable and Probable Cause—Interference in Prosecution—Evidence Shewing.

Motion by plaintiff to set aside nonsuit entered by MERRITH, C.J., in an action for malicious prosecution, tried at Toronto. The plaintiff alleged that the defendant William Boyd (since deceased) laid an information against plaintiff for obtaining \$17.50 by false pretences from one Harkness and caused plaintiff to be tried thereon by the police magistrate, whereupon plaintiff was acquitted, and that the other defendants procured Boyd to lay the information.

G. H. Watson, K.C., for plaintiff.

W. R. Riddell, K.C., for defendants Ewart and Reed.

W. Nesbitt, K.C., and R. McKay, for defendants Gooch, Smith, and Dixon.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J.), was delivered by

FALCONBRIDGE, C.J.—The Chief Justice of the Common Pleas was right in holding that there was no absence of reasonable and probable cause shewn as far as the late William Boyd was concerned. As to the other defendants (except defendant Ewart), practically the only evidence of agency or authority was the payment of their respective quotas of the \$75 collected by Ewart for Boyd's fees and expenses. But the case against plaintiff was then over — the prosecution had determined — and it is not shewn by plaintiff that these other defendants knew what particular services of Boyd they were paying for or what the items of his account were. Motion as to defendants other than Ewart dismissed with costs. As to Ewart there was a case which ought not to have been withdrawn from the jury. He collected the contributions from the other insurance agents (defendants) and paid Boyd's bill. According to Harkness, Ewart wished him (Harkness) to lay the information for fraud, and said that he (Ewart) would lay it or see that it was laid, that it was the only means of Harkness getting his money, and that plaintiff was a rascal and ought to be in the penitentiary. Ewart admits that he knew the information was being laid, and there is evidence from which a jury could infer that he instructed the laying of it. Order made without costs for a new trial as against Ewart.

FALCONBRIDGE, C.J.

AUGUST 5TH, 1903.

CHAMBERS.

RE STECKLEY.

Will—Legacies—Vesting—Assignment by Legatees.

Application by Lydia Steckley, widow of Samuel Steckley, late of the township of Whitchurch, deceased, for an order under Rule 938 declaring whether the legacies in the 5th and 9th clauses of the will are vested in the legatees and whether they can execute valid assignments thereof to the applicant. By clause 3 the testator devised and bequeathed to his wife all his real and personal estate for her own use during the term of her natural life, or so long as she remained his widow, which provision she was to accept in lieu of dower. By clause 4 he directed his executors, after the death of his wife, to collect in his personal estate and sell his real estate. By clause 5 he directed his executors to pay out of the moneys realized certain small legacies to two sons, three daughters,

and a grandson. By clause 6 he provided that in case any of his daughters should die "before the occurrence of any of the above events," the share coming to her should be divided amongst her children, and if she should die without leaving any children, her share should be divided among the surviving daughters. By clause 8 he directed that in case any of the children mentioned in clause 5 should predecease both himself and his wife, the share of such child or children should be divided equally amongst the children of the child or children so dying, and in the event of such child or children dying without leaving any children, the share of such child or children should be divided amongst the survivors of the children mentioned in clause 5. By clause 9 he directed his executors to divide the residue of his estate amongst his six sons, share and share alike. The testator died 31st August, 1896. A son and a daughter had died since the testator, both leaving children. The widow stated that the income of the estate was insufficient for her needs, and that the legatees (her children) were willing that she should have \$1,000 of the principal.

S. B. Woods, for the applicant.

C. R. Fitch, Stouffville, for the executors.

F. W. Harcourt, for the infants.

FALCONBRIDGE, C.J., held that the legacies were vested, and the legatees could execute valid assignments. The infants' shares to be paid into Court. Costs of all parties out of the estate.

FALCONBRIDGE, C.J.

AUGUST 6TH, 1903.

WEEKLY COURT.

DIXON v. GLOBE PRINTING CO.

Injunction—Interim Injunction — Newspaper — Advertisement—Trade Union—Preponderance of Convenience.

Motion by plaintiff to continue injunction restraining defendants from publishing an advertisement in their daily newspaper warning carriage and waggon makers that a strike was in progress in Toronto.

G. H. Watson, K.C., for plaintiff.

F. E. Hodgins, K.C., for defendants.

FALCONBRIDGE, C.J.—The matters involved in this motion are of great importance to newspapers, to employers of labour, and to others, and were argued with much skill and force. But, as the parties did not agree that the motion should be turned into one for judgment in the action, the judgment upon the motion would be of avail only for the few weeks intervening between to-day and the trial, and would not be at all binding upon the trial Judge, and therefore the motion should be adjourned until the hearing. The preponderance of convenience is in favour of the injunction not being dissolved in the meantime. The plaintiff, employer of labour, alleges that he is seriously injured by the publication of the notice in question. The defendants, conducting a great newspaper, are very little interested in the few cents which they would receive daily for insertion of the notice, but are concerned to know the rights and liabilities of a newspaper under these circumstances. There is no other party before the Court, and therefore no one else whose interests have for the present to be considered. Costs to be costs in the cause unless the Judge at the trial shall otherwise order.

FALCONBRIDGE, C.J.

AUGUST 7TH, 1903.

CHAMBERS.

RE RUSSELL AND DOYLE.

Public Schools—Accommodation for Pupils—Formation of New Section—Award—Action to Set aside—Mandamus—Postponement of Application—Convenience—Terms.

Application by Thomas Russell and others, ratepayers of school section 5 in the township of Drummond, in the county of Lanark, for a mandamus to the trustees of the school section to provide adequate accommodation for the school children resident in the section; and cross-motion by the trustees to postpone the hearing of the application for a mandamus until after the trial of an action to set aside an award, which purported to form school section 5.

G. H. Watson, K.C., for the applicants.

J. A. Allan, Perth, for the respondents.

FALCONBRIDGE, C.J., held that it was more convenient and a saving of expense to direct that the disposition of this application should be deferred until after the trial of the action. The trustees defendants in that action should, if required, transfer the conduct of the defence to solicitors and counsel named by the present applicants, on receiving indemnity against costs. The motion for a mandamus to come before the Chief Justice after the disposition of the action on the question of costs, and generally.

[Affirmed by a Divisional Court composed of BOYD, C., and FERGUSON, J., 10th September, 1903.]

FALCONBRIDGE, C.J.

AUGUST 12TH, 1903.

CHAMBERS.

REX v. FOX.

Criminal Law — Summary Trial — Evidence — Consent — Felony — Misdemeanour.

Application, on return of a habeas corpus, for an order directing the discharge of James Fox and J. N. Moore, who were in custody under a warrant of commitment upon a police magistrate's conviction for robbing one D. Mumby of \$100.

D. C. Ross and W. P. McMahon, Belleville, for the prisoners.

Frank Ford, for the Crown.

FALCONBRIDGE, C.J.—At the argument all questions of fact, *e.g.*, as to what took place at the trial, were disposed of adversely to the applicants, and the only question reserved was whether the police magistrate was warranted in acting upon the consent of the prisoners' counsel (given in their presence) that the evidence given on the trial of another prisoner should be read for and against the prisoners applying, their counsel having acted for that other prisoner, and they having been called as witnesses by him and examined and cross-examined on such evidence. It was contended in support of the application, that under *Regina v. St. Clair*, 27 A. R. 308, in such a case as the present, the old rule that consent could not enable such evidence as was here admitted to be so let in (a rule formerly applicable to cases of felony, as opposed to misdemeanours) still survives. Section 535 of

the Criminal Code, provides that "after the commencement of this Act, the distinction between felony and misdemeanour shall be abolished, and proceedings in respect of all indictable offences (except as they are herein varied) shall be conducted in the same manner." When, as here, a certain practice would have been permissible in case of misdemeanour, and not permissible in case of felony, the practice has been to apply the rule as in cases of misdemeanour, and such is the intention of the Code.

Order made discharging the habeas corpus, and remanding the prisoners to custody under the warrant of commitment.

FALCONBRIDGE, C.J.

AUGUST 17TH, 1903.

TRIAL.

MERCHANTS BANK v. GRIMSHAW.

Promissory Notes—Action against Indorser—Indorsements Procured by Fraud of Maker—Notice to Agent of Holder—Notice to Bank—Property in Notes not Passing.

Action on two promissory notes made by the defendant George H. Grimshaw and indorsed by defendants C. A. Irvine and Robert Evans, for \$748 and \$715 respectively. The defendant Irvine alone defended.

W. R. Riddell, K.C., for plaintiffs.

G. F. Shepley, K.C., and W. E. Middleton, for defendant Irvine.

FALCONBRIDGE, C.J.—I find that defendant Irvine's indorsements of the notes sued on were procured by the fraud of Grimshaw, who falsely pretended that he was about to receive a sum of money from England, and that he was purchasing a house in Toronto from Evans, and that the notes were to be placed in Evans's hands as security for the payment of part of the purchase money thereof, and should not be negotiated. I find also that one Robson was the agent of Evans in the transaction and that Robson had notice and knowledge of the fraud which was being practised on Irvine, and that Evans is affected by such notice, if indeed he had not express notice and knowledge thereof. Evans was not, therefore, a holder in due course. On the night of the 2nd October, 1902, the property in the notes had not passed to the plaintiffs. I accept the evidence of Mr. Heggie

as to what took place on the nights of the 2nd and 3rd October, his account of the conversations being preferable both on account of the demeanour of the witnesses and the cogency of the circumstances. I also accept his statement as to the plight and condition of the notes on the 4th October, when he saw them in Brampton. Apart from the admissions made by Mr. Simpson on the night of the 2nd, the intrinsic written and uncontradicted evidence is abundant, that the transaction was not then complete. On that night the plaintiffs, through Mr. Simpson, had full notice of the position of affairs and of the infirmity and defective title to the notes. Mr. Simpson has not, in my opinion, been guilty of intentional misstatement, but his recollection of events has been coloured and distorted by the extremely positive and masterful suggestions of a subordinate officer. I acquit the latter also of intent to do wrong, but his zeal for the bank and its customer Evans, misdirected by an incorrect view of the bank's position, has manifestly affected the conduct of the acting manager and the memory of both. The application of the law to this state of facts is simple. Action as against Irvine dismissed with costs.

FALCONBRIDGE, C.J.

AUGUST 17TH, 1903.

TRIAL.

QUINLAN v. CITY OF BRANTFORD.

Assessment and Taxes—Tax Sale—Description of Land—Assessment Roll—No Taxes in Arrear.

Action for trespass to lands in the city of Brantford.

E. Sweet, Brantford, and M. W. McEwen, Brantford, for plaintiffs.

A. J. Wilkes, K.C., and W. T. Henderson, Brantford, for defendants.

FALCONBRIDGE, C.J.—The plaintiffs claimed title under a tax deed given by defendants in pursuance of a sale of land assessed to Caria R. Wilkes. The land was described in the assessment rolls for 1896, 1897, and 1898 (for which years' arrears it was sold) as "S. pt. B. 2 acres 530 feet frontage." The frontage which plaintiffs bid for at the sale and acquired by their deed was 176½ feet, for which the amount of taxes in arrear was to be paid, and was paid. And the 176½ feet

plus the 300 feet excepted in the deed plus the small un-numbered lot further to the south and east, make up the 530 feet frontage. Then the area of the land of that frontage, extending to and not beyond the high land, was almost exactly two acres. The result is that no land beyond the high land was assessed to Caria R. Wilkes for these years, and there could be no taxes in arrear therefor and no sale or deed thereof. Evidence, parol and otherwise, was admitted, subject to objection, by which plaintiffs sought to avoid this conclusion, but, if admissible, it failed to do so. Action dismissed without costs.

CARTWRIGHT, MASTER.

AUGUST 22ND, 1903.

CHAMBERS.

STANDARD LIFE ASSURANCE CO. v. VILLAGE OF
TWEED.

Summary Judgment—Defence to Action—Municipal Debentures—By-law—No Provision for Payment of Principal—Application of Special Statute.

Motion by plaintiffs for summary judgment under Rule 603 in an action to recover the principal due upon certain debentures issued by defendants and purchased by plaintiffs. In April, 1892, the council of the village passed by-law No. 15, reciting that it was necessary to raise \$5,000 to assist one George Easterbrook in rebuilding his mills; that for this purpose it would be necessary to issue debentures for that sum payable as therein provided; and providing for an annual special rate to supply the sum necessary for payment of the interest at $5\frac{1}{2}$ per cent., being \$275 a year for ten years, but making no provision whatever for payment of the principal, though the reeve was given authority to sign and issue such debentures, and they were made payable as to principal and interest at a private bank in Tweed, and though the principal sum of \$5,000 was directed to be paid in 1902. The debentures were bought by plaintiffs in January, 1893. All interest thereon was paid as it fell due, but payment of the principal was refused, although the debentures were duly presented on 25th March, 1902. This action was commenced on the 20th July, 1903, after an amendment to the Municipal Act had been passed by the Ontario Legislature (sec. 432) reading as follows: "Where in the case of any by-law heretofore or hereafter passed by a municipal council, the interest for one year or more on the debentures issued under such

by-law and the principal of the matured debentures (if any) has or shall have been paid by the municipality, the by-law and the debentures issued thereunder remaining unpaid shall be valid and binding upon the corporation and shall not be quashed or set aside on any ground whatever."

D. L. McCarthy, for plaintiffs, relied on this enactment.

C. W. Craig, Tweed, for defendants, contended that the section was not applicable to the present case; if there had been no mention of overdue principal, very different considerations might have arisen; but here no principal of the matured debentures had been paid, payment having been expressly refused.

THE MASTER held, without expressing any opinion as to what might be the ultimate decision in the action, that a substantial defence was set up, and the defendants should have the opportunity of carrying the case as far as they might be advised. Having regard to all the facts, the motion should not have been made, the section of the statute not mentioning these debentures by name. Motion dismissed with costs to defendants in the cause.

FALCONBRIDGE, C.J.

AUGUST 26TH, 1903.

TRIAL.

CANADA CO. v. TOWN OF MITCHELL.

Municipal Corporations—Local Improvements—Sidewalk—Assessment for—Action to Restrain—Estoppel—Appeal to Court of Revision and County Court Judge—Irrregularities—Costs.

Action for an injunction to restrain the defendants from assessing or levying upon lands of the plaintiffs in the town a tax in respect of the construction of certain cement sidewalks.

By the 8th paragraph of the statement of defence the defendants set up that the plaintiffs, having with a full knowledge of all the facts allowed defendants to construct the sidewalks and incur the expense thereof without any attempt to prevent them from so doing, and having unsuccessfully appealed from the assessment to a Court of Revision, upon the grounds taken in this action, and having further appealed to the County Court Judge, who reduced the assessment, could not now be heard to object to such assessment or to the proceedings upon which it was based.

G. G. McPherson, K.C., for plaintiffs.

F. H. Thompson, Mitchell, for defendants.

FALCONBRIDGE, C.J., held that the matters set up in the 8th paragraph of the defence furnished an answer to the action, but that, as there were irregularities in the proceedings, there should be no costs. Action dismissed without costs.

CARTWRIGHT, MASTER.

AUGUST 28TH, 1903.

CHAMBERS.

STATE SAVINGS BANK v. COLUMBIA IRON WORKS.

*Writ of Summons—Omission of Addresses of Defendants—
Defendant Residing out of the Jurisdiction — Setting
aside Writ—Nullity.*

Motion by defendant Botsford to set aside the writ of summons, the copy served, and the service thereof, because of the omission of the addresses of the defendants. The writ was issued from the office of the local Registrar at Sarnia. An affidavit of a clerk of plaintiffs' solicitors stated that, through a clerical error, the addresses of the several defendants were accidentally omitted. The affidavit of the applicant stated that he was personally served at Meaford, though he was not a British subject, but a citizen of the United States residing at Port Huron. This was not contradicted.

C. A. Moss, for applicant.

W. B. Raymond, for plaintiffs.

THE MASTER held, following *The W. A. Sholten*, 13 P. D. 8, that the address as well as the name of the defendant is a necessary part of the writ. In a proper case relief might be given to plaintiffs under Rule 1224; but no good purpose would be effected by allowing an amendment nunc pro tunc, as such amendment would at once shew that the writ was a nullity as having been issued without an order. The indorsement did not disclose any grounds such as are required under Rule 162, and all such were distinctly negatived by defendant Botsford's uncontradicted affidavit. *Sirdar v. Rajah of Faridkote*, [1894] A. C. 670, and *Connolly v. Dowd*, 18 P. R. 38, referred to. The writ was issued per incuriam and was a nullity and should be set aside with costs. If Botsford were moving only on his own behalf, it would be sufficient to direct his name to be struck out of the writ and give leave to plaintiffs to amend as they might be advised.

TRIAL.

IDINGTON v. DOUGLAS.

Landlord and Tenant—Expiry of Lease—Continuance of Possession—Agreement—Tenancy at Will—Death of Tenant—Corroboration of Evidence of Landlord—Notice to Quit—Forfeiture—Fixtures—Costs—Examination for Discovery.

Action to recover possession of land and for mesne profits, etc.

R. S. Robertson, Stratford, for plaintiff.

J. P. Mabee, K.C., and G. G. McPherson, K.C., for defendant.

FALCONBRIDGE, C.J.—In my opinion, the uncontradicted facts establish a tenancy at will since the expiry of the written lease. The reservation or payment of rent in aliquot proportions of a year is, no doubt, the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year. But this payment does not create the tenancy. It is only evidence from which the Court or jury may find the fact. And the circumstances may be shewn to repel the implication: Woodfall, 17th ed., p. 246. The plaintiff swears that before he accepted any rent after the expiry of the lease he explained to Thomson (one of the lessees and partner of Douglas) now deceased, that he (plaintiff) would not consent to any tenancy from year to year so as to require any notice to be given, and that they should remain in the same position as they were, or would be on expiry of the lease. The parties were contemplating a further term, and plaintiff says Thomson did not demur to this arrangement, but wanted a new lease, and finally assented to it. And again he says that about a year after the expiry he again told Thomson he saw nothing for it but to continue under the same arrangement. The rent was to be the same as that reserved by the lease, and it was to go on in every way subject to the above limitation. Douglas, who was not present at these conversations, cannot deny them, but his account of what Thomson reported to him does not contradict but rather corroborates plaintiff's statement. He says that Thomson reported that plaintiff asked to have the matter stand over until he was dealing with Ferguson, an adjoining tenant, and that plaintiff wanted to have the leases running concurrently. Thomson died on 25th March, 1902, and thenceforward plaintiff in his letters always repudiated

any idea of a yearly tenancy. . . . If plaintiff's statement requires corroboration under R. S. O. ch. 73, sec. 10, there is corroboration.

But, apart from the express agreement which plaintiff sets up, defendants are in the position of tenants whose lease has expired, and who are permitted to continue in possession pending a treaty for a further lease, and so they are not tenants from year to year, but strictly tenants at will: Woodfall, p. 253. That tenancy was determined by demand of possession before action brought. The ineffective notice to quit given by plaintiff on 15th September, 1902, was, no doubt, served *ex abundanti cautela*, and furnishes no sound argument against plaintiff's position.

Many matters relating to assignments of the term and alleged forfeitures thereby which were debated are not material, having regard to the above findings.

Plaintiff expressed himself to be content with judgment for possession, and in that event waived his claim for alleged nuisance and under the Factors' Act. There will be judgment for possession after 30 days, with mesne profits, based on the amount hitherto paid, since 1st February, and proportion of the year's taxes. These amounts may be settled by the parties before the local Registrar at Stratford.

As to fixtures: (1) Defendants may remove mirrors, furniture, and office, do no unnecessary damage. (2) The stairway need not be replaced in its former position. (3) Defendants have option to leave all other fixtures in substitution for what they found there and in full satisfaction of all claim for alteration or removal of partitions, etc. (4) Or defendants may remove all fixtures and pay what the Master at Stratford shall find to be a proper sum for what they removed or converted.

Plaintiff to have his costs of action. Taxing officer to tax costs of defendants' examination for discovery (1764 questions) as if it had been limited to 300 questions.

CARTWRIGHT, MASTER.

SEPTEMBER 9TH, 1903.

CHAMBERS.

CANADA BISCUIT CO. v. SPITTAL.

Venue—Application to Change—Malicious Prosecution—R. S. C. ch. 185, sec. 1.

Motion by defendants to change the venue from Toronto to Ottawa.

J. R. Code, for defendants.

A. M. Denovan, for plaintiffs.

THE MASTER.—At the argument I held that no such preponderance of convenience as is required by the cases had been shewn here: see *Campbell v. Doherty*, 18 P. R. 243.

Mr. Code raised a new point which I reserved for consideration. He relied on R. S. C. ch. 185, sec. 1, which provides that "every action—against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, etc., where the act was committed, and not elsewhere."

The action is to recover \$860 from Spittal and against the other two defendants as his sureties. The defendant Spittal has counterclaimed asking \$5,000 for malicious prosecution by the plaintiffs.

Laying aside the question how far this would be within the powers of the Parliament, if it assumed to annex this condition to actions for malicious prosecution, I am clearly of opinion that it has no such application. This is made clear at least in two ways. First, the title is "An Act respecting actions against persons administering the criminal law." Second, the 2nd section of the Act itself provides for one month's notice in writing before action brought, which action by sec. 1 is required to be brought within six months after the act committed. No one ever heard of any such preliminaries being necessary to enable an action for malicious prosecution to be successfully launched.

It seems plain that this Act is for the protection of officers of the Courts exercising criminal jurisdiction—and is to be so interpreted.

Similar provisions are to be found in the Customs Act, R. S. C. ch. 32, sec. 145, and following.

The motion should be dismissed with costs to the plaintiffs in any event.

SEPTEMBER 8TH, 1903.

DIVISIONAL COURT.

ALLEN v. CROZIER.

Security for Costs—Motion to Set aside Praecipe Order—Plaintiff out of the Jurisdiction—Moneys in Hands of Defendant—Action for Account.

Appeal by defendant from order of STREET, J., in Chambers (8th June, 1903), reversing order of Master in Chambers

(ante 485) which dismissed plaintiff's motion to set aside a præcipe order for security for costs. Action for an account brought by a resident out of the jurisdiction against his former solicitor.

J. W. McCullough, for defendant.

T. H. Lloyd, Newmarket, for plaintiff.

THE COURT (BOYD, C., FERGUSON, J.), held that under the circumstances of the case (as reported ante 485), the defendant's solicitor was not entitled to security for costs. Appeal dismissed. Costs in the cause.

CARTWRIGHT, MASTER.

SEPTEMBER 9TH, 1903.

CHAMBERS.

O'CONNOR v. O'CONNOR.

Jury Notice—Leave to File—Delay—Short Notice of Trial.

Motion by the plaintiff for leave to file a jury notice and give short notice of trial.

T. F. Slattery, for plaintiff.

W. B. Raymond, for defendant.

THE MASTER.—This is an interpleader issue to determine whether the defendant holds a certain beneficiary certificate absolutely or only as security for moneys lent by him to the deceased.

The case of *Qua v. Woodmen of the World*, 5 O. L. R. 51, ante 8, would indicate that in a proper case it would be a proper exercise of judicial discretion to allow either party to file a jury notice when this has not been done.

But the same case shews that "there is no power to abridge the time allowed the defendant unless he is in such a position that terms may be imposed on him."

Then the effect of allowing a jury notice to be filed would be to throw the case over these present sittings. The result would be delay in winding up the estate of the deceased and delaying the other parties concerned in the matter.

It was also argued by Mr. Raymond that the issue was equitable, and that the question to be determined was one within the jurisdiction of the Court of Chancery. In this he is probably correct. But I have not fully considered that point, as I think the motion should be refused on the other ground.

The costs will be in the cause.

FERGUSON, J.

SEPTEMBER 9TH, 1903.

TRIAL.

BRIDGE v. JOHNSTON.

Indian Lands—Assignment of Right to Cut Timber—Subsequent Conveyance of Land—Registration in Department of Indian Affairs—Priorities—Actual Notice—Document Incapable of Registration—Conditional Assignment.

Action for damages for cutting and removing timber from land and for an injunction to restrain defendant from further cutting and removing.

David Robertson, Walkerton, for plaintiff.

C. S. Cameron, Owen Sound, for defendant.

FERGUSON, J.—The lands in question are lot 8 in the 8th concession east of the Bury road in the township of Eastnor in the county of Bruce, and are lands originally surrendered by and set apart for the use of the Chippewas of Saugeen, Owen Sound Indians, and held, sold, and administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R. S. C. ch. 43. The lands are unpatented. It was freely admitted by counsel at the trial that on the 27th November, 1899, James W. Freckleton was the owner of and had a good title to these lands. On that day the said James W. Freckleton made a sale of certain timber on these lands to one Jamieson Johnston, and duly executed an assignment or transfer of this timber. The operative parts of the assignment are in the words and figures following, that is to say:—

“The party of the first part (Freckleton) agrees to sell, and the party of the second part (Jamieson Johnston) agrees to purchase all the timber 10 inches and over in size on lot 8.

concession 8, township of Eastnor, E.B.R., for the price or sum of \$350, payable as follows." (The times and mode of payment of the purchase money are then stated.) "The party of the second part is to have five years from the date hereof to cut and remove said timber, having the right to make roads and go in and out of the said property during the said term."

Jamieson Johnston did not register this assignment in the office of the Superintendent-General, nor has it, nor have any of the assignments made under it hereafter referred to, been so registered.

On the 2nd March, 1902, Jamieson Johnston assigned and transferred all his interest in respect of the said timber and land to his brother Robert James Johnston, and on the 16th December, 1902, the said Robert James Johnston assigned and transferred all his right and interest to another brother, Samuel Johnston, the defendant.

A part of the timber mentioned in the assignment to Jamieson Johnston has been cut and removed, but there is a substantial part of it remaining uncut upon the land.

On the 15th November, 1900, the said James W. Freckleton sold, assigned, and transferred the land, this lot No. 8, to the plaintiff, Thomas John Bridge, his heirs and assigns forever, and at the trial it was admitted that this conveyance had been duly registered in the office of the Department of Indian Affairs, with the Superintendent-General on the 29th November, 1900. Freckleton had contracted to sell the land to one Bosley, who had contracted to sell it to the plaintiff. It was agreed that Freckleton should convey and assign to the plaintiff, instead of having two conveyances, and the conveyance was accordingly made directly to the plaintiff. At the time this was done, and of course before the plaintiff registered his conveyance, both Bosley and Freckleton told him that Jamieson Johnston had the right to cut timber on the land until the spring of 1902, but there was not anything said about any assignment or transfer from Freckleton to him, and it is not shewn that the plaintiff had notice or knowledge of such an assignment or transfer till long after the registration by him of the transfer to himself.

The defendant was proceeding to cut and take away timber from the lot in the spring of 1903, when the plaintiff brought this action.

Section 43 of the Act provides for the keeping of a book by the Superintendent-General for registering, at the option

of the party interested, the particulars of any assignment, and provides that every assignment registered shall be valid against any assignment previously executed which is subsequently registered or is unregistered, and that every assignment when registered shall be unconditional in its terms. The original Act, 43 Vict. ch. 28, sec. 43, provides, amongst other things, that any assignment to be registered must be unconditional in its terms.

This law of registration seems to apply to an assignment made as well by the original purchaser or lessee of Indian lands or his heirs or legal representatives, as by any subsequent assignee or the heirs or legal representatives of such assignee. The section of the Act respecting registration would, according to its terms, seem to be absolutely decisive as to priority. There does not seem to be any provision (as in our Registry Act) as to "actual notice" had by the subsequent assignee who first registers his assignment, but I think the law so clearly laid down by Lord Cairns in the case *Agra Bank v. Barry*, L. R. 7 H. L. 147, 148, must apply, and that, although the plaintiff's assignment was registered as aforesaid, yet, if he had at the time actual notice of the assignment to Jamieson Johnston, he cannot have the priority he seeks. Such actual notice has not, I think, been proved. There are other cases to the same effect as the *Agra Bank* case.

A question may arise as to whether the law of registration has any application. This rests upon the contention that the interest purchased by Jamieson Johnston from Freckleton was a chattel interest, and not an interest in land. The cases in our own Courts relating to this subject are somewhat numerous and not all in accord. I have perused a large number of these cases, among them being *Johnston v. Shortreed*, 12 O. R. 663; *Corbett v. Harper*, 5 O. R. 93; *Summers v. Cook*, 18 Gr. 179; *McNeill v. Haines*, 17 O. R. 479; *Steinhoff v. McRae*, 13 O. R. 546; *Handy v. Carruthers*, 25 O. R. 279; *Ford v. Hodgson*, 3 O. L. R. 526; and I cannot avoid being of the opinion that the interest assigned by Freckleton to Jamieson Johnston was an interest in land, and not a mere chattel interest. To this opinion I think I am bound by the cases *Summers v. Cook* and *Ford v. Hodgson* above. It would appear, as I think, if there were no further or other controlling elements in the case, that the priority is in favour of the plaintiff. See the cases *McLean v. Burton*, 24 Gr. 134, and *Ferguson v. Hill*, 11 U. C. R. 53.

I am, however, after the best consideration I have been able to give the subject, of opinion that the assignment from Freckleton to Jamieson Johnston was a conditional

document, that is to say, that it was not an unconditional assignment, within the meaning of the Act. It was not, as I think, unconditional in its terms, and, according to the words, and, as I think, the spirit of the Act, it was incapable of being registered in the manner prescribed by the Act. The local agent of the Department was called as a witness, and he was of the opinion that the document was incapable of registration, and said that, had it been offered to him to forward for registration, he would have rejected it, on the grounds stated above.

Then, according to the doctrine of the case *Harrison v. Armour*, 11 Gr. 303, and the cases and authorities referred to in it, this document (the assignment from Freckleton to Johnston) did not require registration to preserve its priority.

This assignment was first in time. It was not, as I think, affected by the registration of the assignment to the plaintiff. I am of the opinion that the title of the defendant is superior to that of the plaintiff, and that the plaintiff's action should be dismissed, and I see no good reason for withholding costs. The interim injunction is also dissolved with costs, including the costs of the motion for it.

SEPTEMBER 9TH, 1903.

DIVISIONAL COURT.

BERRIDGE v. HAWES.

Action—Summary Dismissal—No Reasonable Cause of Action Alleged—Claim for Wrongful Dismissal—Claim to Enforce Mechanic's Lien—Company—Agreement with.

An appeal by plaintiff from order of MACMAHON, J., in Chambers (ante 619), setting aside statement of claim and vacating registration of mechanic's lien.

W. E. Raney, for plaintiff.

W. H. Blake, K.C., for defendant.

THE COURT (BOYD, C., FERGUSON, J.), dismissed the appeal with costs, but varied the order by discharging the part which directed the vacating of the lien. This order to be without prejudice to plaintiff filing a new statement of claim (if so advised) claiming damages for wrongful dismissal only, after payment of the costs here and below.

WINCHESTER, Co.J.

SEPTEMBER 10TH, 1903.

TRIAL.

BROWN v. VANDERVOORT.

Contract—Work and Labour—Proof of Contract—Servant or Contractor—Burden of Proof—Damages for Defective Work—Trade Discounts—Right of Master to Credit for—Counterclaim—Costs.

Action brought in the High Court by Alexander Brown and the Alexander Brown Milling and Elevator Company, against Manley Bird Vandervoort to recover damages for breach of contract in the construction of certain grain bins and an elevator in connection with the flour mill and grain elevator of plaintiffs. They alleged that defendant, representing himself to be an expert bin and elevator builder, entered into a contract with them to construct bins and an elevator, in a first-class workmanlike and proper manner, at a cost not to exceed \$2,300, and that defendant was to furnish his own plans and specifications for such work, which was to be of the most modern and improved type, with sufficient strength and durability for the purpose for which it was intended; that, after defendant had done a considerable portion of the work, plaintiffs found that the work was defective, unworkmanlike, and wholly unfit for the purpose for which it was designated, and terminated the agreement, and a short time afterwards plaintiffs placed a small quantity of grain in the bins, whereupon the foundation collapsed, and plaintiffs were obliged to tear down and replace a portion of the work. They claimed \$6,861.06.

Defendant denied making the contract as alleged by the plaintiffs, and stated that he was engaged by plaintiffs to hire and furnish labour, at the prevailing rates of wages, necessary for the construction of certain grain bins and elevator equipment and to take charge of the men, etc. Defendant counterclaimed for \$496.33, balance due for moneys expended in wages and material.

The action was tried before WINCHESTER, Co.J., sitting for MEREDITH, C.J.

W. Proudfoot, K.C., and A. A. Miller, for plaintiffs.

R. C. Clute, K.C., and A. R. Clute, for defendant.

WINCHESTER, Co.J.—The agreement between the parties not having been reduced to writing, the onus of proving the contract alleged by plaintiffs was on them, and they failed in the proof. I must find that the defendant was engaged by

plaintiffs to construct the bins, etc., and was to receive wages for doing so, and not a specified sum. . . . Defendant was dismissed from the work on 17th June, 1902, and the collapse took place about 22nd July, 1902, more than a month after plaintiffs had taken possession of the premises and employed skilled men to complete the work. . . . Plaintiffs' men were aware that the foundation was not sufficiently strong to support any heavy weight, and they placed grain in the bins after being warned by the men in charge of completing the building, that it was dangerous to do so. . . . The defendant is not liable for damages caused by the collapse of the building. But portions of the work of defendant were so performed as to cause greater expense in finishing than it would have cost had the work been finished and completed in a workmanlike manner. Defendant failed to exercise the amount of care and skill which was necessary and which he undertook to exercise, and for which he was charging, and plaintiffs suffered damage by reason of having to make changes and remedy defects. These damages should be assessed at \$100. *Farnsworth v. Garrald*, 1 Camp. 38, referred to.

A question was raised as to certain allowances made to defendant by persons supplying material for the work, which defendant termed "trade discounts." On settling certain of the accounts for material defendant claimed a trade discount, and having received it applied it to his own use, refusing to give plaintiffs the benefit thereof. He received in this way \$131.70. The plaintiffs contend that the defendant acted as plaintiffs' servant and agent in purchasing the material, and that they are entitled to have this sum applied in reduction of his claim. I agree with that contention. . . . *Jones v. Linde British Refrigeration Co.*, 2 O. L. R. 428, and cases there cited.

As to the correctness of defendant's counterclaim there was no serious dispute.

Judgment for defendant for \$264.63 with costs on the County Court scale without set-off.

SEPTEMBER 10TH, 1903.

DIVISIONAL COURT.

CONMEE v. LAKE SUPERIOR PRINTING CO.

Libel—Pleading—Defence—Fair Comment—Untrue Statements of Fact—Embarrassing Pleading—Amendment.

Appeal by defendants from order of STREET, J. (ante 543), reversing order of Master in Chambers (ante 509),

and directing that certain paragraphs of the defence in an action for libel should be struck out or amended.

C. A. Moss, for defendants.

N. W. Rowell, K.C., for plaintiff.

THE COURT (BOYD, C., FERGUSON, J.), dismissed the appeal with costs to plaintiff in the cause, agreeing with the opinion of Street, J.

CARTWRIGHT, MASTER.

SEPTEMBER 12TH, 1903.

CHAMBERS.

TOPPING v. EVEREST.

*Security for Costs—Infant Plaintiff—Injury to—Action for
—Joinder of Parent—Next Friend—Both Plaintiffs out
of Jurisdiction.*

Motion by defendant for security for costs.

Action for damages for an injury caused to the infant plaintiff and for loss occasioned thereby to the co-plaintiff, the infant's father, by whom also as next friend the infant sued.

After the issue of the writ of summons the whole family removed to the United States, and the father sold all the property he had in Ontario.

C. A. Moss, for defendant.

J. R. Meredith, for plaintiffs.

THE MASTER.—It was admitted that the father must give security if he intends to proceed with his claim; but it was argued that in no case could the next friend of an infant be required to give security for costs.

This was distinctly held in *Moran v. Kellogg*, 10 C. L. T. Occ. N. 184. . . . To the same effect are *Roberts v. Coughlin*, 18 P. R. 94. . . . *Scott v. Niagara Navigation Co.*, 15 P. R. 409. . . . In the latter case the Chancellor said: "The primary object in requiring that an infant shall sue by next friend is not that the defendants may have security for costs, but that there must be some one before the Court to answer for the propriety of the action, and through whom the Court may compel obedience to its orders."

How far this requirement is met by a next friend permanently resident out of the jurisdiction, I have not previously had to consider. . . . The point has never been raised or decided.

If the principle of *Scott v. Niagara Navigation Co.* is to be followed, it would seem that the next friend if out of the jurisdiction, should in some way be made amenable to the orders of the Court. This could be to some extent accomplished by requiring him to give security like any other absent litigant.

On consideration, I think it will be best to order that the plaintiff John Topping (the father) do give the usual security. In default of this being done, so much of the statement of claim as asks for \$2,000 for himself must be struck out. The usual security would enable the whole action to proceed, and, if this is done, no more need be said. But, failing this, I would give leave to the defendant to renew the motion, so that the point, which is new, so far as I am aware, may be further considered, if the parties so desire.

The remarks . . . in *Taylor v. Wood*, 14 P. R. at p. 456, as to the power to appoint—in cases of commendable litigation—the official guardian as next friend, may be of assistance in the matter.

CARTWRIGHT, MASTER.

SEPTEMBER 12TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

*Writ of Summons—Service—Irregularities—Jurisdiction—
Action respecting Foreign Lands—Confirming Proceedings—
Conditional Appearance.*

The action was brought to set aside a mortgage made by the plaintiffs of certain lands in the North-West Territories, for a declaration that defendants the Leadleys held the lands as trustees for plaintiffs, for an injunction restraining those defendants from dealing with the lands, and for an account.

After the issue of the writ of summons, an order was made by a local Judge adding the Moores as defendants, and allowing service on them out of the jurisdiction of a concurrent writ. This order was applied for by plaintiffs in consequence of their solicitor having been told by the solicitor for the original defendants, the Leadleys, that (as was the fact) they had entered into an agreement with defendant J. T.

Moore in respect of these lands, which agreement he had afterwards assigned to his wife, the other added defendant.

The added defendants moved to set aside the service of the concurrent writ and the order allowing the same.

A. J. Russell Snow, for the applicants, took various technical objections to the order and service. He also contended that no cause of action was disclosed by plaintiffs, even as against the Leadleys.

J. W. St. John, for defendants the Leadleys, asked to be allowed to withdraw their appearance and enter a conditional appearance disputing the jurisdiction of the Court.

J. J. MacLennan, for plaintiffs, shewed cause.

THE MASTER.—It is not necessary for the protection of defendants the Leadleys to allow them to enter a conditional appearance. . . . All objections to the jurisdiction can be taken effectually in the statement of defence. Even if not taken, they can be raised at the hearing, as was done in *Gunn v. Harper*, 2 O. L. R. 611 (see p. 621) . . .

It would be improper for me to assume to decide the action. The utmost I could do would be to refuse any amendment of the proceedings if convinced that plaintiffs' case was hopeless.

But, after a consideration of *Gunn v. Harper*, 30 O. R. 650, 2 O. L. R. 611, I should hesitate to say that plaintiffs may not shew themselves entitled to some part of the relief sought for. (*Pavey v. Davidson*, 23 A. R. 9, and *Purdum v. Pavey*, 26 S. C. R. 412, also referred to.) . . .

It may well be held that in the present action the title to land outside this Province is not involved in such a sense as would leave the whole jurisdiction in the Courts of the North-West Territories, and render nugatory any decree in personam that could be made by the Courts of this Province.

I am, therefore, of the opinion that plaintiffs cannot be interfered with at this stage of the proceedings. The only order I can make is one confirming the proceedings, but with costs to the Moores in any event. Defendants may enter conditional appearances, if so advised.

THE ONTARIO WEEKLY REPORTER.

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FERGUSON, J.

SEPTEMBER 14TH, 1903

CHAMBERS.

STANDARD LIFE ASSURANCE CO. v. VILLAGE OF TWEED.

Summary Judgment—Defence to Action—Municipal Debentures—By-law—No Provision for Payment of Principal—Application of Special Statute.

Appeal by plaintiffs from order of Master in Chambers (ante 731) dismissing application by plaintiffs for summary judgment under Rule 603 in an action to recover the amount due upon certain debentures issued by defendants and purchased by plaintiffs.

D. L. McCarthy, for appellants.

C. W. Craig, Tweed, for defendants.

FERGUSON, J.— . . . I think the provisions of sec. 432 have direct application to the case and to this motion. The interest on the debentures was paid for a long series of years, and there were no matured debentures on which the principal would have been paid. There were no debentures falling due till the debentures sued on matured. These matured at the same time, and to pay the principal on them would end the whole of the difficulty, for this is the very thing the plaintiffs sue for. I cannot see how the words in the section "and the principal of the matured debentures" can have any application or force, in the circumstances and facts of the case, and I think the by-law and the debentures sued on are declared to be valid and binding upon defendants. I am unable to see how there can be any substantial defence to the action, and I think the order asked for should go. . . .

SEPTEMBER 14TH, 1903.

DIVISIONAL COURT.

STRUTHERS v. CANADIAN COPPER CO.

Master and Servant—Liability of Master to Pay for Medical Attendance on Servant—Privity—Implied Authority—“Hospital Fund.”

Appeal by defendants from judgment of MEREDITH, J., at North Bay, as regards \$280, for which he directed judgment to be entered against the defendants, not to be paid by them personally, but out of what was called the “hospital fund.” The claim of plaintiffs, who were practising physicians and surgeons having a hospital at Sudbury, was for surgical operations and surgical and medical attendance upon three men who were employed at the works of defendants and were injured while so employed. Menard, one of the men, was employed by defendants, but the other two were not; they were employees of a contractor for defendants, named McKinnon. The hospital fund was made up of contributions retained out of the men’s pay, and was designed to provide medicine and medical attendance for the men when they required it. McKinnon’s men were, it was admitted, entitled to the benefit of the fund. Menard was brought to plaintiffs for treatment by the master mechanic in the department of defendants’ works in which Menard was employed, and the master mechanic, according to plaintiff Struthers, said that defendants “would be good” for Menard. The other two men were brought by McKinnon, Dr. Coleman, one of defendants’ physicians in charge, accompanying him when Roy was brought.

W. Nesbitt, K.C., for appellants.

A. B. Aylesworth, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., MACLAREN, J.A.) held that there was nothing which entitled plaintiffs to recover as upon an express or implied retainer or employment of them by defendants to perform the services which were rendered, on the credit of defendants. One occupying the position of master mechanic in the employment of another has no implied authority to pledge his employer’s credit for such services as were performed by plaintiffs, and there was no evidence that the man who brought Menard to plaintiffs had any express authority to do so. So with Dr. Coleman; and

McKinnon was not an employee of defendants. For the same reasons, there was no liability of defendants created to pay out of the hospital fund.

Appeal allowed with costs, and action so far as it relates to the \$280 dismissed with costs.

SEPTEMBER 14TH, 1903.

DIVISIONAL COURT.

RE O'SHEA.

*Will—Construction—Devise of Land—Direction to Devisees
—Maintenance of Sisters.*

Appeal by Susannah O'Shea from an order of STREET, J., in Chambers, ante 224, on an application by the executors of the will of Thomas O'Shea, under Rule 938, for a determination as to the rights of the appellant under the will, which directed "my said executors or my said two sons to give to their sisters Bridget and Susannah each a cow and a proper and sufficient bed and bedding in case of their marriage; until they marry, my said sons are bound to keep them in a suitable manner, free of expense; and I direct that so long as they or either of them keep house for their brothers they or she are to have full control of the poultry on the place and of the eggs, also of the butter each year after the factory closes, and until same re-opens again, all moneys derived from such sources to belong to them the said two girls for their own use and benefit share and share alike." The appellant's contention was that she might reside where she chose and that her brothers were bound to pay her a sufficient sum to enable her to maintain herself. Street, J., declared that the sons sufficiently complied with the will if they offered to support their sisters on the farm or in their home situate elsewhere.

R. R. Hall, Peterborough, for appellant.

G. Edmison, K.C., for respondents.

THE COURT (MEREDITH, C.J., MACLAREN, J.A.), held that the decision below was right, and dismissed the appeal with costs.

SEPTEMBER 14TH, 1902.

C.A.

CITY OF TORONTO v. BELL TELEPHONE CO. OF
CANADA.

Constitutional Law—Incorporation of Companies—Dominion Objects—Interference with Property and Civil Rights in Province—Telephone Company—Right to Carry Poles and Wires along and across Streets—Consent of Municipalities—Dominion and Provincial Acts—Construction—Estoppel.

Appeal by the defendants from the judgment of STREET, J., 3 O. L. R. 465, 1 O. W. R. 192, in favour of plaintiffs, upon a special case stated by the parties, holding that the appellants had not the right to carry any poles or wires (whether above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council of the city.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and GARROW, J.J.A., on the 17th November, 1902.

W. Cassels, K.C., G. Lynch-Staunton, K.C., and S. G. Wood, for appellants.

C. Robinson, K.C., and J. S. Fullerton, K.C., for the plaintiffs.

ARMOUR, C.J.O., was appointed a Judge of the Supreme Court of Canada shortly after the argument, and died before judgment was given. MOSS, J.A., became Chief Justice in December, 1902.

MOSS, C.J.O.—Upon the case stated by the parties two questions arise for decision.

The first is whether the work or undertaking for the prosecution of which the defendants were incorporated by the Act 43 Vict. ch. 67 (D.) is one falling within the description of a work or undertaking connecting the Province with any other of the Provinces or extending beyond the limits of the Province, within the meaning of clause 10 (a) of sec. 92 of the B. N. A. Act.

If this question is answered in the affirmative, then the work or undertaking falls within the exclusive legislative authority of the Parliament of Canada under clause 29 of sec. 91 of the Act, and thereupon arises the second question, viz.,

what, if any, effect has the Act 45 Vict. ch. 71 (O.), passed by the Legislature of Ontario at the instance of the defendants, upon the rights conferred upon them by their Act of incorporation, as amended by the Act 45 Vict. ch. 95 (D.)

Are these rights in any way curtailed or qualified by the provisions of the Ontario Act? Dealing with the first question, it is important to note the objects or purposes for which incorporation was sought and granted. These are set forth in sec. 3 of the Act 43 Vict. ch. 67 (D.), as amended by 45 Vict. ch. 95. Those enumerated in the beginning of the section, viz., the manufacture of telephones and other apparatus connected therewith, and their appurtenances and other instruments used in connection with the business of a telegraph or a telephone company, and such other electrical instruments or plant as the company may deem advisable, and the purchasing, selling or leasing of the same and rights relating thereto, are not to be considered as other than local. And if the defendants' purposes and objects were confined to operations of the kind mentioned, there would be no difficulty in saying that incorporation for such purposes might and should properly be sought from the Provincial authority.

But the difficulty is in respect to the other objects and purposes set forth in sec. 3. They are far wider and more extensive in their scope. Power is given to build, establish, construct, purchase, acquire, or lease, and maintain and operate, or sell or let, any line or lines for the transmission of messages by telephone in Canada or elsewhere, and to make connection for the purposes of telephone business with the line or lines of any telegraph or telephone company in Canada or elsewhere, and to aid or advance money to build or work any such line to be used for telephone purposes, with power to borrow money upon the company's bonds for carrying out any of the objects or purposes of the Act. Reading this language of the section, it is difficult to resist the conclusion that it was contemplated and intended that the defendants would extend their operations into more than one Province of the Dominion, and probably beyond the Dominion. It is true that they are placed under no compulsion to do so, but it is not unlikely that it was considered that the *famae auri* would be a sufficient incentive to them to avail themselves to the full extent of their powers. Doing so involves the construction or acquisition and operating of telephone lines extending across the boundaries of one Province into another, or the uniting with telegraph lines the wires of which cross the boundaries between Provinces. If, as seems to be the case with telegraphs, the wire is a sufficient link of connection between two Provinces, or at all events the carrying of a tele-

graph wire from one Province into another is an extension of the work or undertaking beyond the limits of one Province, it is difficult to deny the same effect to a telephone wire. And the conclusion must be that the work or undertaking authorized by sec. 3 of the defendants' Act of incorporation is one falling within clause 10 (a) of sec. 92 of the B. N. A. Act. And the question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction, nor does it affect the validity of any incorporation or the status of the incorporated body as a corporation. As said by the Judicial Committee in *Colonial Building and Investment Association v. Attorney-General for Quebec* (1883), 9 App. Cas. at p. 165, "Surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one Province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion. The company was incorporated with power to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation."

The first question must, therefore, be answered in the affirmative.

It remains to consider the second question. The argument for the respondents is that, granting the legislative authority to be in the Parliament, and not in the Legislature, the defendants, having applied for and obtained legislation from the Legislature, must be held to have consented that in any conflict of the enactments those passed by the Legislature should prevail.

It may well be doubted whether there was any occasion for the Act (45 Vict. ch. 71, O.) The general objects and purposes for which the defendants were incorporated being such as came within the legislative authority of Parliament, it was proper that it should confer upon the defendants such general powers as were necessary to enable the works or undertaking to be effectually proceeded with, and this was the purpose of sec. 3 of the Act of incorporation. The preamble of the Provincial Act, however, shews that its purpose apparently was to allay doubts in regard to those portions of the defendants' work and undertaking which were local, and did not extend beyond the limits of this Province. And the

legislation was sought as a measure of precaution rather than with the purpose or intention of giving up any powers or rights the defendants were entitled to under their Act of incorporation.

Nor is there anything on the face of the legislation to indicate that the defendants had entered into or were making a bargain to that effect. There is nothing there to prevent them from now insisting on such rights as were given them by the Parliament in respect of matters on which it had undoubted authority. Among these were the rights given by sec. 3 of the Act of incorporation, which enables them, subject to the provisos and conditions therein and in the amending Act 45 Vict. ch. 95 (D.) contained, to construct, erect, and maintain their line or lines of telephone along the sides of and across or under any public highway or street. These, having been granted in furtherance of objects or purposes properly authorized by the Parliament, could not be impaired by the action of the Provincial Legislature.

Therefore the defendants are entitled to the full benefit of the language of sec. 3 of their Act of incorporation as amended, notwithstanding the Act 45 Vict. ch. 71 (O.)

The result is, that the appeal should be allowed, and that, instead of the declaration made by Street, J., it should be declared that the powers conferred by the defendants' Act of incorporation, 43 Vict. ch. 67 (D.), as amended by the Act 45 Vict. ch. 95 (D.), are not curtailed by the provisions of the Act 45 Vict. ch. 71 (O.), as regards the right to construct, erect, and maintain their line or lines of telephone along the sides of and across or under any highway or street of the city of Toronto, subject, however, to the provisos set forth and contained in sec. 3 of the Act of incorporation as amended.

Under the circumstances, there should be no costs of the litigation to either party.

GARROW, J.A., gave reasons in writing for the same conclusion as Moss, C.J.O.

OSLER, J.A., also concurred.

MACLENNAN, J.A., concurred in holding that the defendant company was one to which Parliament could and did give not merely corporate powers, but certain powers to interfere with property and civil rights in the several Provinces of the Dominion:

He dissented, however, as to the effect of the Provincial Act, the concluding part of his opinion being as follows:—

A Dominion corporation may obtain its powers over property in a particular Province either from Parliament or from

the Legislature of the Province, or partly from one and partly from the other. In the present case, by sec. 26 of its Act of incorporation, the company obtained from Parliament power to purchase and lease property, but no power of expropriation; it might obtain the latter power, in any Province, from its Legislature. If that be so, it follows, I think, that a Dominion company may, by application to the Legislature of a Province, have its powers over property in that Province enlarged, diminished, varied, or qualified in any manner whatever, whether such powers were originally obtained from the Dominion or from the Province, or partly from the one and partly from the other.

For these reasons, I am of opinion that the company, having applied for and procured this Act of the Legislature, modifying its rights and powers on and over highways, etc., is as much bound thereby as the municipalities, and that the Act is binding on both.

That being so, the judgment appealed from is right and ought to be affirmed.

SEPTEMBER 14TH, 1903.

C.A.

MIDLAND NAVIGATION CO. v. DOMINION
ELEVATOR CO.

*Ship—Charterparty—Breach—Failure to Deliver Cargo—
Duty of Charterers—Time—Insurance—Failure to Carry
Goods—Place of Loading—Terms of Contract—Custom
of Port—Measure of Damages.*

Appeal by defendants from judgment of MACMAHON, J., 1 O. W. R. 593, in favour of plaintiffs in an action for the alleged breach of a contract by defendants to furnish plaintiffs' steamer "Midland Queen" with a cargo of grain to be carried from Fort William to Goderich.

Plaintiffs alleged failure to load the grain on the ship. Defendants denied liability and counterclaimed for damages for breach of plaintiffs' agreement to carry the grain.

The appeal was heard by MOSS, C.J.O., MACLENNAN, GARROW, and MACLAREN, J.J.A.

A. B. Aylesworth, K.C., and C. A. Moss, for appellants.

C. Robinson, K.C., and F. E. Hodgins, K.C., for plaintiffs.

Moss, C.J.O.— . . . As the case developed at the trial the controversy between the parties was reduced to the question of whether the defendants had performed their part of the contract by having, as it was shewn that they had, before and at the time specified for loading, a sufficient quantity of grain in the elevators at Fort William to have furnished a full cargo if the vessel had come under the spouts, or whether they were bound to go further and provide or secure for the vessel an unimpeded access to the spouts in time to enable her to load there within the time specified, or failing that to load her by some other means within the specified time. And this is the main question for decision on this appeal.

There is a further question, whether, if the defendants are liable at all, the damages awarded ought not to be reduced by the amount of the expense which would have been incurred by the vessel in carrying the cargo to Goderich.

In delivering judgment the learned trial Judge stated that these expenses should be deducted, but in settling the formal judgment the question was referred to him, and he directed that no reduction should be made.

The learned trial Judge found for the plaintiffs and directed judgment to be entered for the plaintiffs for the sum of \$4,590, being the amount of the freight which would have been earned if the vessel had received her cargo.

The main facts are scarcely, if at all, in dispute. Both parties set up and rely upon a contract contained in a number of telegrams and some letters passing between one A. F. Read, of Montreal, who was admittedly acting for the plaintiffs, and one G. R. Crowe, of Winnipeg, with regard to whose position some doubt has been raised, but whom the learned Judge has found to have been acting for the defendants.

Two of the telegrams upon which a great deal of the controversy turns are dated the 23rd November, 1901, and are as follows:—

(1) Read to Crowe: "Playfair confirms charter Queen, Fort William to Goderich, loading about December 2nd, weather, ice, permitting, four and a half cents bushel. Confirm."

(2) Crowe to Read: "We confirm Midland Queen, four and half, Goderich, load Fort William on or before noon 5th December."

Following these was a letter from Read to Crowe, dated 23rd November, stating as follows: "Playfair wires confirming charter to you of steamer Queen to load at Fort William before noon December 5th to Goderich at four and a half cents per bushel. Please say who she is to be loaded account of and to whom captain will apply for grain." This letter,

which expressed the plaintiffs' understanding of the terms of the contract and their acceptance of them, was received by Crowe, and by him handed or read or the contents stated, to one Frederick Phillips, the defendants' general manager at Winnipeg and was accepted without objection.

The plaintiffs' vessel sailed for Fort William on the 30th November, and her departure was notified by Read, and Playfair, the plaintiffs' manager, to Crowe at Winnipeg.

In the autumn of 1901 there were at Fort William three working elevators, the property and under the control of the Canadian Pacific Railway Company, and beyond doubt fully answering the description of terminal warehouses within the definition of the Manitoba Grain Act, 63 & 64 Vict. ch. 39 (D.) They were situate up stream three-fourths of a mile or more from the mouth of the river. The one nearest the mouth was known as elevator C. About 200 feet further up was elevator A., and 1,000 or more feet further on was elevator B. There was also a steel or tank elevator situate still further up stream, but this was not available in December, 1901.

There are no special berths for vessels, but along the north bank of the river is a long continuous dock with a line of posts to which the vessels may tie up. And by the established practice of the port all vessels except the Canadian Pacific Railway Company's passenger steamers are required to wait their turn, and to come up to the elevators in the order of their arrival in the river. The only method of loading vessels with grain at Fort William was through the spouts of the elevators, and a vessel of the capacity of the Midland Queen, i.e., about 103,000 bushels, could be loaded in eight or nine hours from the time she came under the elevator spouts. Upon the arrival of a vessel the captain reported to the person in charge of the elevators, and without this person's leave the captain could not bring his vessel under the spouts of the elevators.

In the autumn of 1901 the elevators were in charge of one Sellers, to whose orders the vessels were subject as regards the order and time of their coming to load.

The Midland Queen arrived and tied up along the bank of the river on the afternoon of Tuesday the 3rd December. At that time of the year—within a couple of days of the close of the season—there is always a number of vessels waiting their turn, and there were eight vessels ahead of the plaintiffs' in course of being loaded or awaiting their turn at the elevators.

The plaintiffs' vessel was insured under two policies, in each of which was contained a warranty that she should not be engaged in navigation from 5th December, 1901, to 1st

April, 1902, but in the event of her being on a voyage at noon on the 5th December, 1901 (Chicago time), the policy was to continue until arrival at port of destination. This was not made known to the defendants, but they were aware that the usual conditions of insurance on hulls was to that effect. The defendants were covered by open policies on all shipments up to and inclusive of the 5th December in vessels reporting at an elevator ready to load at or before 6 o'clock in the afternoon, but this was not known to the plaintiffs otherwise than as they may have been aware of the general conditions of insurance upon cargoes carried on the upper lakes. . . .

On the morning of the 5th the vessel had in due course reached a place in the river where she was within about 300 feet of elevator C. There was a vessel (the *Rosedale*) at the spouts, and the plaintiffs' vessel was next in order for them. It was supposed that the *Rosedale* would complete her loading about 9.30 in the morning. Before that hour Sellers told the captain of the plaintiffs' vessel that they could not fully load her before noon, but proposed that she should come under the spouts and he would start her load before dinner so as to save the insurance, and complete her that night. He knew that the vessels were hastening to get away before noon to save their insurance. At first the captain seemed disposed to meet the suggestion, but finally, on receipt by him of a telegram from the plaintiffs ordering him home, he left for Collingwood shortly before 11 o'clock, it being apparent, of course, that she could not load before noon.

From the time of her arrival until her departure both parties appear to have been exerting themselves to the utmost to get the vessel loaded.

The plaintiffs contend that the failure to do so was due to the defendants' default. The defendants, on the other hand, contend that they did everything that the contract required, and had the cargo at the place of loading ready to be loaded into the vessel before the time named in the contract, and that the failure to do so was owing to the default of the plaintiffs in not having their vessel at the place of loading ready to take the cargo on board within the time specified in the contract.

The defendants' duty under the contract was to furnish a cargo of wheat at the place of loading agreed upon, and upon the evidence it is beyond question that the place of loading contemplated and agreed upon by both parties was the elevators. There was no thought or intention in the minds of either of loading by any other means than through the elevator spouts. In fact there was no other method of loading

vessels with grain at Fort William, and this was perfectly well understood by the parties at the time of making their agreement.

In the contract in question, where the parties speak of Fort William, they must be deemed to be speaking of the elevators as the defined place at which the loading was to take place. And the proper way to read it is as if the words "at the usual place" were in the contract, for that is, in effect, what the parties contracted for.

The plaintiffs' contract, therefore, was to proceed to the usual place of loading and there receive the cargo and carry it to Goderich, the point of destination.

The defendants' contract was to have a cargo of grain at the elevators ready to deliver so as to enable the loading to be completed within the time limit. A question has been made as to the time at which the loading was to be completed, whether the contract required that it should be completed at or before noon of the 5th December, or whether it called for more than that the loading should be commenced at or before that hour.

It must be taken that Crowe's telegram to Read of the 23rd November, "We confirm Midland Queen four and a half Goderich, load Fort William on or before noon," was despatched on behalf of the defendants, and that the language was theirs or was adopted by them. Read's letter of the same day shewed his understanding of that telegram, and if the defendants' understanding was different it was their duty to have drawn attention to it, and have the matter put right before it was acted upon. The telegram and letter, fairly read, convey the meaning that the vessel was to get her load by noon, that is, that the defendants were to have the cargo at the elevators ready to deliver within such reasonable time before noon of the 5th as to enable the vessel to be loaded by that time. In that respect the defendants have made no default, for it is now beyond question that they had the grain at the elevators, and that the vessel could have been loaded in good time if she had come to them.

No liability as to loading attached to the defendants. The law in this respect appears to be as stated by Brett, L.J., in *Nelson v. Dahl* (1879), 12 Ch. D. at p. 582:—"The primary right of the charterer as to loading under a charterparty in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charterparty as the place whence the carrying voyage is to begin, and the ship is ready to load, and he, the charterer, has notice of both these facts; when these conditions are fulfilled the liability of the charterer begins." In the present case,

if the true construction of the contract is that the place of loading was the elevators, then the vessel was never at the place named in the charterparty as the place whence the carrying voyage was to begin. The plaintiffs, however, contend that, not only were the defendants to have the cargo at the elevators ready to deliver within a reasonable time before the expiry of the time, but they were also bound to have and keep a clear road to the elevators, so as to enable the vessel to reach the elevators in sufficient time to enable her to receive her load before the expiry of the limit.

It may be that if the elevators and the ways were the defendants' property that would have been their duty. They would certainly not be justified in keeping obstructions in the vessel's way. But, to the knowledge of both parties, the elevators were terminal warehouses, not in any manner under the control of the defendants, and all vessels arriving were subject to the custom or practice of the port by which they must load in turn, though, even if the custom was not known to them, it would make no difference. In *Postlethwaite v. Free-land* (1880), 5 App. Cas. at p. 613, Lord Blackburn said, referring to a charterparty which contained a reference to the custom of the port: "I do not think that this alters the question, as the express reference to the custom of the port of discharge is no more than would be implied. For I take it that a charterparty, in which there are stipulations as to loading or discharging cargo in a port, is always to be construed as made with reference to the custom of the port of loading or discharge, as the case may be. See *Hudson v. Ede*, L. R. 2 Q. B. 566, L. R. 3 Q. B. 412, though it was expressly found in that case that the shipowner and his broker were not aware of the usage." Later on Lord Blackburn approved of the direction of Lord Coleridge to the jury that "custom" in the charterparty did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port.

The settled and established practice at Fort William in regard to loading vessels with grain is clearly shewn to be to load at the elevators in their turn. The defendants did nothing to cause any obstruction to the plaintiffs' vessel or to prevent her from reaching the elevators and being loaded according to the custom.

The principle that has been applied in regard to discharging, where by the custom of the dock the work was done by third parties independent of both the shipowner and the charterer, as in *The Jaedereu*, [1892] P. 351, ought in reason to be applicable to loading.

The plaintiffs having failed to shew that the defendants were in default are not entitled to succeed against them, and their action should have been dismissed.

It follows that the plaintiffs, having failed to perform their part of the contract, are liable for the consequences of the breach, unless they can excuse themselves on the ground of prevention by the other vessels. But they were aware when they made the contract of the chance of there being a block of vessels awaiting their turn for the last trip, and must be regarded as having undertaken the chances resulting from that condition of affairs. Their insurance was liable to be ended unless they were on a voyage at noon on the 5th December, and, knowing that and the probability of a block at Fort William, they should have made sure of the arrival of the vessel in time to enable her to load in time. And not having done so and having departed without the cargo, the defendants are entitled to such damages as they can shew to be such as may be considered to have fairly resulted from the breach of the contract, and to have been in the contemplation of the parties. The defendants make claim for loss of interest on the price of the cargo, for insurance, for extra freight, and for depreciation in price. They were relieved by McGaw, the purchaser, from the contract they had made to deliver the grain at Goderich; and they were, therefore, not called upon to forward the grain by other means of conveyance at an increased rate, and no charge on that account can be maintained. The damages are, therefore, to be measured by the injury suffered by the cargo being left on the defendants' hands: Mayne, 3rd ed., p. 259.

It appears that the price that was to be paid by McGaw was regulated by the price of Chicago May wheat, and, although the defendants say there was a loss to them of profit by reason of such sale being given up, their manager, Mr. Phillips, was unable to put it into figures.

Besides, the defendants disposed of a considerable part, if not all, of the quantity to be carried, at the elevators or at Fort William not long after the plaintiffs' breach, at figures which Phillips rather vaguely puts at from 3 to 4 cents a bushel below the price on the 5th December, but he furnishes no satisfactory data, and on the evidence it is not possible to say that the price realized was not equal to the price to be ultimately paid at Goderich, less the 4 1-2 cents per bushel for freight. The fact of the sales and that Mr. Phillips found it impossible to separate the grain intended for Goderich from the other grain in the elevators, upon which he had to pay storage and insurance, reduce the claim for interest, storage, and insurance to a small sum, which does not appear to

be capable of separation from the other claims and the amount of which is not stated.

On the whole, in view of the circumstances and the nature of the evidence on the question of damage, the defendants should be confined to nominal damages for breach of the contract, say \$50.

The appeal is allowed and the plaintiffs' action is dismissed with costs. There will be judgment for the defendants on their counterclaim for \$50 damages with costs.

The plaintiffs must pay the costs of the appeal.

GARROW and MACLAREN, JJ.A., concurred.

MACLENNAN, J.A., dissented.

SEPTEMBER 14TH, 1903.

SKILLINGS v. ROYAL INS. CO.

Fire Insurance—Notice to Company Terminating Policy—Registered Letter—Wrong Address—Receipt after Loss—Statutory Conditions.

Appeal by defendants from judgment of LOUNT, J., 4 O. L. R. 123, 1 O. W. R. 411, in favour of plaintiffs for \$8,661.67 and costs in an action to recover the amount of an insurance against fire upon a stock of lumber at Parry Sound.

The appeal was heard by MOSS, C.J.O., MACLENNAN, GARROW, and MACLAREN, JJ.A.

C. Robinson, K.C., and C. S. MacInnes, for appellants.

W. R. Riddell, K.C., and A. Fasken, for plaintiffs.

GARROW, J.A.—This is an appeal from the judgment of Lount, J., who tried the case without a jury, and directed a judgment in favour of the plaintiffs for the amount claimed.

The action is upon an insurance policy, dated 24th January, 1901, to run one year from the hour of noon of that day, for \$10,000, at the premium of \$165, paid in cash on the delivery of the policy.

The property covered by the policy, which consisted of lumber, was destroyed by fire on the night of 5th June, 1901, and the material question in dispute is whether the policy was on foot when the loss occurred, or whether it had been can-

celled and surrendered by a written request from the assured to cancel, sent by mail before, but not received by the defendants until after, the fire.

The facts are fully stated in the former report of the case, and it is, therefore, unnecessary to repeat them here.

An argument addressed to us by the learned counsel for the defendants, apparently for the first time, or at all events not referred to in the judgment as reported, was that the plaintiffs had, in addition to the statutory right of surrender and cancellation, a similar common law right, and that if they had not well executed their statutory right they had at least executed the alleged common law right, by executing and mailing the written surrender and cancellation on 30th May. But granting the common law right to disclaim and renounce at any time a benefit which is unaccompanied by any corresponding burden or duty, it seems a complete answer to say that as a matter of fact there is no evidence upon which to found such an argument. There was no absolute cancellation and surrender on 30th May. What was done on that day was at most conditional, or, in other words, preparatory to a desired cancellation to take place on 5th June. The indorsement must be read with the letter which accompanied it, in which the plaintiffs say, "We desire to cancel as of June 5th."

It would, it appears to me, be a wholly unwarrantable liberty to take both with the documents, and the plain intention, to read the indorsement itself as amounting to an immediate cancellation as of 30th May. It is quite apparent that the plaintiffs intended to continue to be insured under the policy until 5th June, and equally apparent that from that date they intended to claim a refund of the unearned premium, a right which could not have been claimed except under the statute.

And this was the view of the defendants themselves when framing their statement of defence, that is, that the plaintiffs were proceeding in what they did under the statutory conditions, and not in the assertion of any common law right.

The real question must, therefore, I think, continue to be, did what took place amount to a statutory surrender and cancellation at the instance of the insured, so as to put an end to the policy before the fire?—a question which has been answered, I think properly, in the negative, by the learned Judge at the trial, in a careful and well reasoned judgment, which, in my opinion, leaves very little to be usefully said.

This case is not, in my opinion, to be distinguished from the case of *Crown Point Iron Co. v. Aetna Insurance Co.*, 127 N. Y. St., a unanimous judgment of the State Court of Appeals, reversing the considered judgment of the State Su-

preme Court, and, therefore, a decision, under the circumstances, of high authority, although not of course binding upon this Court, where it was held that the insurance company, under a state of facts not unlike those in the present case, must prove that the notice to cancel was received by the company before the fire, and that a notice sent before, but not received until after, the fire, was wholly ineffectual, the rights of the parties having under the contract been vitally altered by the intervening fire.

I adopt this view of the law as sound. Giving such a notice is wholly the voluntary act, and for the exclusive benefit, of the insured. So long as it rests in intention the insurer has no power or control over the matter whatever. The notice may be recalled up to the last moment before it reaches its statutory home in the hands of the insurance company, and what is equivalent to a recall may be accomplished by indirect, as well as by direct, interference on the part of the insured, as in this case by an erroneous address upon the letter intended for the defendants, but retarding its delivery.

I think the appeal fails, and should be dismissed with costs.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., and MACLAREN, J.A., also concurred.

SEPTEMBER 14TH, 1903.

C. A.

SAUNBY v. LONDON WATER COMMISSIONERS.

Water and Watercourses—Injury by Dam—Statutory Authorization—Water Commissioners—Notice of Action—Limitation of Actions—Easement—Prescription—Laches—Injunction—Damages.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., 1 O. W. R. 567, in favour of plaintiff for an injunction and damages in respect of the penning back, by a dam erected by defendants on the river Thames, of water needed for the purposes of plaintiff's mill in the city of London.

A. B. Aylesworth, K.C., and T. G. Meredith, K.C., for appellants.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for plaintiff.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, and MACLAREN, J.J.A.), was delivered by

MACLAREN, J.A.—This action was brought by the proprietor of a mill on the river Thames, in the city of London, against the water commissioners of that city, for damage caused to his water power by defendants' dam at Springbank, some four miles lower down the river, and for an injunction. Defendants were incorporated by the Ontario statute 36 Vict. ch. 102 for the purpose of supplying water to the inhabitants of London, and in 1879 built the dam in question, and also acquired another mill privilege between that and plaintiff's for the purpose of furnishing power to pump to the city the water for its use, which was obtained from another source.

Defendants denied the injury to plaintiff and claimed that they were authorized to do what they had done by the Act of 1873; that a month's written notice of the action should have been given; that the action was barred by the lapse of more than a year under sec. 31 of the above Act; that plaintiff by laches, acquiescence, and delay had disentitled himself to relief; and that defendants, by themselves and their predecessors in title, had acquired a prescriptive right to dam up the stream as they had done.

The action was by consent referred to Messrs. Wisner and Kennedy, two hydraulic engineers, to examine and report whether the water was prevented from flowing from plaintiff's tail-race and lands by defendants' dam and flashboards, and if so to what extent. After they had made their report the case came on for trial before Falconbridge, C.J., without a jury. . . . Upon the report and evidence he held that plaintiff was entitled to an injunction, and ordered a reference to determine what damages he had suffered during the six years preceding the institution of the action.

By sec. 5 of the Act of 1873 the commissioners were authorized to enter upon any lands in the city of London or within fifteen miles of the city and to survey, set out, and ascertain such parts thereof as they might require for the purposes of the water works; and also to divert and appropriate any river, pond, spring, or stream of water therein, and to contract with the owner or occupier of such lands for the purchase thereof or of any part thereof, or of any privilege that might be required for the purposes of the commissioners, and in case of disagreement the matter was to be determined by arbitration.

Section 31 of the Act provides that if any action be brought against any person for anything done in pursuance of the Act, it shall be brought within six months after the act committed, or in case there shall be a continuation of damages then within one year after the original cause of such action arising.

It is to be observed that the water of the river Thames is not conveyed to the city by the waterworks; the use made of it by the commissioners is the generating of power to pump to the city the water obtained from another source. No authority is given to the commissioners by the Act to interfere with any other occupied water power on the river for obtaining such power. It is also worthy of note that in the general statute passed in the same year (ch. 40) for the improvement of water privileges for manufacturing, milling, or hydraulic purposes, it is specially provided that no occupied mill privilege or water power shall be in any manner interfered with or encroached upon under the authority of that Act, without the consent of the owner.

I am of opinion that the defendants had no authority by virtue of their special Act or the general law to back the water up on the plaintiff as they have done, and that their doing so was not something done in pursuance of their special Act within the meaning of sec. 31 so as to enable them to set up the short limitation of six months or twelve months.

By sec. 17 of the special Act the commissioners are to have the like protection in the exercise of their respective offices, and the execution of their duties as justices of the peace, and they claim that they were entitled to a month's notice in writing before the bringing of the action, which was not given them. What has just been said about the short limitation is equally applicable to this point; and in addition it is to be observed that this is an action to restrain defendants from continuing a nuisance or trespass. It is well settled that the provision requiring such notice is not applicable where an injunction is sought: *Attorney-General v. Hackney Local Board*, L. R. 20 Eq. 626; *Sellers v. Matlock Bath Local Board*, 14 Q. B. D. 928. This rule applies even when damages are also claimed: *Flower v. Local Board of Low Leyton*, 5 Ch. D. 347; *Bateman v. Poplar District Board*, 33 Ch. D. 360.

Defendants also claimed that they had acquired the right to dam the water as they had done by prescription, and that in any event plaintiff had disentitled himself to relief by laches, acquiescence, and delay. Defendants' dam was erected in 1879, the injury which plaintiff claims he has suffered began in 1880, when defendants placed flashboards upon their dam.

The use of these flashboards was, however, only intermittent. They were kept up only during low water and not always then, especially for a considerable period after the steamboat disaster of 1881. The present action was begun on the 19th August, 1897, so that the prescription of twenty years claimed by defendants cannot be maintained.

Nor is plaintiff disentitled to relief on the ground of laches, acquiescence, or delay. All that can be alleged against him on this head is his delay in bringing his action. He complained from time to time, but was tardy in seeking redress. But mere lapse of time is no bar to an injunction sought to restrain the invasion of a legal right unless the legal right itself is barred: *Radenhurst v. Coate*, 6 Gr. 139; *Fullwood v. Fullwood*, 9 Ch. D. 176.

At the trial and in this Court it was strongly urged on behalf of defendants that the injury plaintiff suffered from back water was caused by an obstruction in the tail-race a short distance below his mill. The engineers, Wisner and Kennedy, speak of this obstruction as extending from a point 50 feet below plaintiff's mill to about 120 feet below the mill, and say that the back water does not rise above the obstruction until the water surface at defendants' dam at Springbank is raised by the flashboards 3.85 feet above the crest of the dam. This obstruction at its highest point is several inches above the level of the floor under plaintiff's wheel, and its effect is said to be to cause a pool of water to be retained immediately below the wheel. There is a conflict of testimony as to the origin and nature of this obstruction. Defendants claim that it has always been there, the digging of holes shewing that it is part of the original bed. Plaintiff, on the other hand, claims that it was caused by a land slide which was only partly cleaned out, and the experiments by his witnesses would go to establish this theory. So far as this may be material, the weight of evidence would appear to be on the side of the plaintiff. But, even if defendants' theory is correct, it would not be a complete answer to the action. They have no right to back the water up plaintiff's tail-race, even if it does not rise above and pass over this obstruction. The obstruction does not extend to the lower boundary of plaintiff's land, and he would still be entitled to bring an action to prevent defendants acquiring a prescriptive right to this flooding, even if it never passed over the obstruction or reached his wheel. At the most it would apply only to the quantum of damage, and not to the injunction or the right of action.

On the whole, I think the judgment appealed from is right and should be affirmed.

SEPTEMBER 14TH, 1903.

C. A.

OTTAWA ELECTRIC CO. v. CONSUMERS' ELECTRIC CO.

Municipal Corporations—Contracts with Electric Light Companies—Use of Streets—Poles and Wires—Proximity—Rival Companies—Injunction—Apprehension of Danger—Judgment—Limiting Relief.

Appeal by plaintiffs from judgment of MACMAHON, J., 1 O. W. R. 154, in so far as it was against plaintiffs in an action brought to restrain defendants from erecting or maintaining poles and wires in certain streets in the city of Ottawa, in such proximity to those of plaintiffs as to interfere with the proper working of their system, or to constitute menace and danger to plaintiffs or to their employees or to the general public. The judgment was in favour of plaintiffs as prayed, but in settling the judgment a clause was inserted (by direction of the Judge) allowing defendants to maintain their wires on certain streets within the distance otherwise prohibited by the judgment, upon insulators being provided. The plaintiffs appealed from this part of the judgment. Defendants, by way of cross-appeal, contended that the action should be dismissed altogether.

A. B. Aylesworth, Q.C., and G. F. Henderson, Ottawa, for plaintiffs.

W. Nesbitt, K.C., and Glyn Osler, Ottawa, for defendants.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, and MACLAREN, J.J.A.), was delivered by

GARROW, J.A.—This is an appeal by the plaintiffs from the judgment of MacMahon, J., awarding to the plaintiffs an injunction restraining the defendants, a rival electric company, from so placing their poles, wires, etc., as to interfere with the poles, wires, etc., of the plaintiffs, the elder company; but, as the plaintiffs allege, unduly limiting the injunction in paragraphs 7 and 8 of the judgment. And a cross-appeal by the defendants against the whole judgment.

Dealing first with the latter, I am of the opinion, after a perusal of the evidence, that, while the case can scarcely be called a strong one, the apprehension on the plaintiffs' part

that the defendants' works as projected would or might injuriously affect or interfere with those of the plaintiffs, was well grounded and that, therefore, the injunction was properly granted. The plaintiffs were not, in my opinion, obliged to wait until the defendants' works were completed, but might reasonably assume from what was already done, in the planting of posts, the placing of cross-arms, the cutting of gains, etc., that these works, when completed upon the foundation thus laid for them, would be an injurious and illegal interference. The plaintiffs are and for some time have been in occupation. They have a fully established plant, established with the consent of the municipal authorities, and they have by reason of such occupation a legal right as against the defendants to be protected in a reasonable user of the public streets, not only against any actual but any threatened interference by reason of the new works projected by the defendants. The use by the plaintiffs of the public streets must of course be reasonable, as is well pointed out in the judgment of the learned trial Judge, and only in so far as their user is reasonable are they entitled to protection. There is nothing, however, in the judgment of the learned Judge to indicate that in his opinion the plaintiffs had acted or were acting unreasonably in their mode of occupation. This disposes of the cross-appeal, which should, I think, be dismissed.

With reference to the plaintiffs' appeal, I am of the opinion that the clauses objected to do unduly limit the relief to which the plaintiffs are, under the circumstances, entitled. The learned trial Judge in a careful review of the evidence came to the conclusion, wholly justified, that a safe distance to be maintained by the wires of the respective companies was three feet between primary wires as between themselves, and between primary wires and secondary wires; and six inches between secondary wires and secondary wires. That being, as I think, the conclusion which the evidence warrants, I have been wholly unable to see why an exception in the interest of the defendants should be made by the introduction of the clauses 7 and 8, which, it may be observed, formed no part of the original judgment as pronounced; indeed, these clauses seem to me to be a distinct departure from that which had been earlier adjudicated as the respective rights and duties of the parties. It is said that the change was made because otherwise it would be difficult or perhaps impossible for the defendants to occupy Slater street, already occupied by the plaintiffs.

It is not necessary to determine the point, but I think, from looking at the plan, and from what I gather from the evidence, that the defendants can obtain access to the heart

of the city by using, if necessary, other streets than Slater street. It is a matter apparently of expense or of convenience, and such considerations ought not to outweigh the prior right to protection to which the earlier sections of the judgment properly declare the plaintiffs to be entitled. Without the paragraphs objected to, the defendants are not, I think, barred from Slater street itself, because it appears to me to be quite possible for both companies, acting, as they are bound to act, reasonably, to use that street and yet keep their wires at the proper distance; although I do not proceed upon that, but upon this, that no sufficient reason is shewn why an exception should be made in the case of that street.

I also think it is objectionable that by these clauses the defendants are to be permitted to handle the plaintiffs' wires, and to confine them by the novel and untried insulation proposed. The plaintiffs ought not, I think, to be compelled to consent to such an interference with their property; nor should the plaintiffs' right to apply to the Court in case of breach be intercepted, and in effect taken away, by compelling a reference of a dispute to the city engineer as proposed.

Upon the whole, I am of the opinion that the judgment originally pronounced was correct; that the cross-appeal should be dismissed with costs; and the plaintiffs' appeal allowed with costs.

SEPTEMBER 14TH, 1903.

C. A.

EARLE v. BURLAND.

*Interest—Charging Accounting Party with—Money Paid to
Manager of Company in Excess of Salary—Trustee—
Statute of Limitations—Reference—Powers of Master.*

Appeal by defendant G. B. Burland from judgment of
MEREDITH, C.J., 1 O. W. R. 527.

The facts are stated in the judgment.

W. D. Hogg, K.C., and G. F. Shepley, K.C., for appellant.

A. H. Marsh, K.C., and C. J. R. Bethune, Ottawa, for
plaintiffs.

The judgment of the Court (Moss, C.J.O., OSLER, MACLENNAN, GARROW, J.J.A.) was delivered by

Moss, C.J.O.—Appeal by the defendant George B. Burland from the judgment of Meredith, C.J., upon an appeal from the report of the Master at Ottawa and on hearing on further directions.

The ground of appeal is that the learned Chief Justice erroneously determined that the appellant was chargeable with interest upon a sum of \$58,556.25 which the Master, upon taking the accounts directed to be taken by him, found to be due by the appellant in respect of sums withdrawn by him from the British American Bank Note Co., as salary, in excess of the salary to which he was entitled as general manager.

The appellant has been for many years the president and general manager, as well as the principal shareholder, of the company. On the 24th April, 1888, a resolution was, at his instance, passed by the board of directors providing for an increase of salary to the "staff," equal to 5 per cent. on the capital stock held by each of them. The reason of this was that it was in contemplation to remove the operative part of the business from Montreal to Ottawa, and some of the employees made representations as to the difficulties and expense to them arising out of the removal. And by the resolution it was left with the appellant to make the best arrangements he could with reference to the assistance to be given the employees. Commencing on the 1st August, 1889, and thenceforward until December, 1900—a period of over 11 years—the appellant withdrew from the company at the rate of \$5,025 per annum as salary, in addition to \$12,000 per annum to which he was entitled. And he claimed to be entitled to the benefit of the resolution as one of the staff.

By the judgment of this Court, affirmed in this respect by the Judicial Committee of the Privy Council, it was held that the resolution was never intended to apply to the appellant, and it was declared that the appellant was liable to account for all sums so withdrawn, and it was referred to the Master to take an account of what was due from the appellant upon that and other accounts.

The appellant admitted having withdrawn altogether \$58,556.25, and with this sum he was charged by the Master. The Master was requested to charge the appellant with interest, but declined to do so, and at the plaintiffs' request ascertained the amount of interest and reported the same at the sum of \$22,540.67.

Upon appeal and hearing on further directions, Meredith, C.J., held the appellant chargeable with the interest.

We think the judgment is right and should be affirmed. As regards these moneys, the appellant's position was and is that of trustee for the company. His position is the same or similar to that of the appellants in the case *In re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519. The case is even stronger against the appellant than the case cited, for there the appellant had paid away to others a great portion of the moneys of the company which were sought to be recovered back, while here the sums were withdrawn and retained by the appellant for his own use. Yet in *Flitcroft's case* the appellants were held liable as trustees, and were ordered to repay the amount with interest. And on the ground that they were trustees, it was held that the Statutes of Limitation did not apply.

Here, notwithstanding his plea of the Statute of Limitation, the appellant has been held liable to repay moneys received in and since the year 1889, more than 6 years before action, and this could have been upon no other ground than that he is a trustee. That being so, there is no reason for relieving him from the payment of interest. There is no valid justification for his act in withdrawing the moneys from the company's funds and appropriating them to his own use. His position in the company required that he should exercise a careful supervision over the payments to be made to members of the staff under the resolution, and it is plain from the circumstances leading to the passing of it and the reasons why it was called for, as well as from the language itself, that it was only intended to apply to employees under him who were to be under the necessity of removing to Ottawa. The appellant does not pretend that he was to remove or that he did remove to Ottawa, and, as held by this Court and the Judicial Committee, it was not intended to include him. If it was not intended to include him, no person could have been better aware of it than he was, and there was nothing to warrant him in putting such an interpretation upon it. The case is one in which the ordinary rule of requiring restoration of trust funds with interest should be enforced.

Under the terms of the reference and the wide powers conferred upon the Master by Con. Rules 666 and 667, he had full power and jurisdiction to charge the appellant with interest. By Rule 666 it is expressly provided that in order to enable the Master to exercise the powers conferred upon him by the following Rules it is not necessary that the judgment or order of reference should contain any specific direction in respect thereof. The silence of the judgment upon the subject of interest is therefore no reason for not charging it. On the contrary, the Master is bound to proceed under

the Rules, unless there is something in the judgment or order of reference expressly limiting his powers in the particular case.

There is nothing of the kind in this case.

Even if the Master was not empowered to deal with the question, it was competent for the Court to deal with it on further directions.

The reasons stated by the learned Chief Justice and the authorities cited by him fully support his judgment.

The appeal is dismissed with costs.

If the appellant was not within the rule as to trustees, he would still be liable for interest from the date of the commencement of the action.

There was then a demand for restitution of the moneys withdrawn, but he wrongfully or without title retained them, and has not yet restored them.

C.A.

SEPTEMBER 14TH, 1903.

GLASGOW v. TORONTO PAPER MANUFACTURING CO.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Defect in Machine—Unsatisfactory and Inconsistent Findings of Jury—New Trial.

Appeal by defendants from judgment of BRITTON, J., in favour of the plaintiff, upon the findings of the jury, in an action for damages for injuries sustained by plaintiff while in the employment of defendants owing to the alleged negligence of defendants, under the Workmen's Compensation Act and at common law.

H. Cassels, K.C., and R. S. Cassels, for appellants.

G. I. Gogo, Cornwall, and H. Beattie, Clinton, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—. . . The plaintiff, a young man of 19 years of age, went into defendants' employment in the month of June, 1902. He was put to work at a paper cutting ma-

chine . . . in the use and management of which he was instructed by defendants' foreman. The purpose of the machine is to cut and trim blocks of paper. . . . The operator standing in front of it places upon the table of the machine the block or pad of paper intended to be cut. By a double movement of the throw-off handle by the operator parts of the machinery are set in motion by means of which the power is communicated; a clamp descends which fastens the block firmly in position; this is followed immediately by the knife which makes the cut required. When the double movement of the handle has been completed, it is at once released by the operator, the cut is made and the clamp and knife return to their former position, automatically, as the witnesses say, or in the course of the motion imparted to the shaft by the driving gear. In the upward movement, the machine is thrown out of gear or locked . . . ready to be again-set in motion by a repetition of the double movement of the throw-off handle.

On the 19th June, 1902, when plaintiff had been working at the machine for a week, he placed a block of paper on the table, cut it in the usual way, and as the knife was ascending proceeded to take out or turn round one of the parts in order to trim the edges by another cut. In doing this his hands were necessarily under or partly under the knife, which, unexpectedly and without having been set in motion by him, fell, severing one of his hands and mutilating the other. The knife had never come down in this way before, while he was working the machine, without using the handle, and from his instructions as to its user and mode of operation he had no reason to expect that it would do so. . . .

[The learned Judge referred at length to the evidence.]

Questions were put to the jury, which, with their answers, are as follows:—

(1) Was the personal injury caused to the plaintiff by any defect in the condition or arrangement of the defendants' paper cutting machine? Ans. Yes.

(2) What was the defect in the condition or arrangement of that machine? Ans. We cannot answer.

(3) Was this defect known to Shepherd, the superintendent employed by the defendants, of this machine and the working of it? Ans. Yes.

(4) Was this defect not remedied owing to the negligence of the defendants or of some person intrusted by them with the duty of seeing that the condition of the machine was proper? Ans. Was not remedied owing to the negligence of the defendants.

(5) Was this machine as operated when accident occurred dangerous to operate by reason of liability of it not to lock when knife went up? Ans. Yes.

(6) Was plaintiff ignorant of the existence of this danger? Ans. Yes.

(7) Were defendants aware of the existence of this danger? Ans. Yes.

(8) Could plaintiff by the exercise of ordinary care have avoided the accident? Ans. No.

(9) What damages do you find? Ans. \$2,500.

(10) Were the defendants guilty of negligence by reason of which plaintiff sustained damages? Ans. Yes.

(11) What is the negligence you find, if any? Ans. By not repairing the machine.

(12) Was plaintiff himself guilty of negligence which contributed to the accident? Ans. No.

The case for plaintiff must rest upon secs. 3 (1) and 6 (1) of the Workmen's Compensation Act and upon proof that the injury he sustained was caused by reason of a defect in the condition or arrangement of the machinery or plant used in the business of his employers. As the case was presented to the jury upon the evidence on both sides, it appears to me to have been an extremely difficult one for them to deal with in arriving at a conclusion as to how the accident happened and what was the cause of it, and the first four questions submitted to them have not been answered in such a way as to admit of judgment being entered thereon in the plaintiff's favour. Although the jury have found that the injury was caused by a defect in the condition or arrangement of the machine which was known to the defendants' superintendent, Shepherd, and which was not remedied owing to defendants' negligence, they were unable to find or determine what the defect in question was. That was the first thing which it was essential for plaintiff to prove, and, as he failed to do so, the other answers of the jury relate only to a defect not proved, and are therefore fruitless. The answers to the other questions, in view of the fact that the jury were unable to answer the second question, appear to me unsatisfactory and inconsistent, and leave it quite doubtful whether the jury were able to understand or appreciate the evidence as to the construction and operation of the machine. This, I must say, was left in a state of considerable obscurity not merely to the jury, but also to the trial Judge and counsel on both sides. Why the knife fell, whether owing to some defect in the machine itself, which plaintiff's own witnesses were unable to point out, or to the speed at which the knife

shaft was revolving, did not appear. Plaintiff . . . gave no evidence of defective construction, and, so far as the evidence for the defence explained the construction, it went to shew that the knife could not fall unless the shaft was revolving at too high a rate of speed. Whose neglect that would be, whether of plaintiff himself or some other person, there was no evidence, or whether in fact the machine was being run at too great a speed, nor was there any evidence of any defect, repair of which might have prevented the accident.

There should, in my opinion, be a new trial, and it would be more satisfactory, I think, that on the second trial the jury or the Judge, if the case is tried without a jury, should see the machine itself and the operation of its several parts in order to understand and apply the evidence. It may be that a clearer view of the operation of what is spoken of as the friction clutch and the spring or springs which it works with, will point to a cause of the accident and suggest the possibility of a condition of things in which the power might not be disconnected and the machine thrown out of gear in the complete revolution of the driving wheel.

The costs of the appeal and of the last trial to abide the event.

CARTWRIGHT, MASTER.

SEPTEMBER 18TH, 1903.

CHAMBERS.

BUCKINDALE v. ROACH.

Security for Costs—Costs of Former Action Unpaid—Instructions Given by Same Plaintiff—Action Brought in Name of Wrong Person.

Motion by defendant for security for costs or to stay proceedings until the costs of a former action should be paid. Two years earlier an action for malicious prosecution had been brought against defendant in the name of Josiah Buckindale, the father of William Buckindale, the present plaintiff. This was a mistake of the solicitor, who had been instructed by the present plaintiff and only by him. On the action coming on for trial on 6th March, 1903, it was necessarily dismissed with costs. These costs were taxed at \$91.80, and had not been paid. On 26th March the present action was begun. The case was ready for trial when the motion was made. No reason was given for the delay in moving,

nor was any argument based on it. It was conceded that the motion could succeed only on the ground that both actions were substantially those of the present plaintiff. In plaintiff's affidavit filed in answer to this motion, he stated that the first action was his action, brought on his instructions, but, by mistake, in the name of his father.

J. W. McCullough, for defendant.

S. B. Woods, for plaintiff.

THE MASTER held that it was equitable that the defendant should have the costs of the first action paid, or security for costs of the second with a stay until security given or costs paid. The defendant was certainly being harassed a second time at the instance of the same person for the same cause of action. If any hardship must fall on one of two innocent persons, the person whose action caused the difficulty must not complain if he had to bear it. It certainly should not be thrown on defendant, who was not responsible for the mistake. The following authorities were referred to:—Rule 1198(d); *May v. Werden*, 17 P. R. 530; *Re Payne*, 23 Ch. D. 288; *Martin v. Earl Beauchamp*, 25 Ch. D. 12; *McCabe v. Bank of Ireland*, 14 App. Cas. 413; *Re United Service Association*, [1901] 1 Ch. 97.

SEPTEMBER 19TH, 1903.

C.A.

REX v. NOEL.

Criminal Law—Evidence—Right of Prisoner's Counsel to Re-examine Witness—Statement to Crown Counsel on Cross-examination—Voluntary Statement—Repetition of Conversation.

The prisoner was convicted before MEREDITH, C.J., at the Assizes at Ottawa, in May, 1903, upon an indictment, under the provisions of the Criminal Code, for shooting at one Laroque with intent to commit murder, and was sentenced to five years' imprisonment in the penitentiary.

A motion was made on his behalf to this Court for leave to appeal as on a reserved case, and two objections were taken to the proceedings before and at the trial. The first was as to the constitution of the grand and petit juries; and the second was as to the refusal of MEREDITH, C.J., to allow the prisoner's counsel to re-examine a witness named Pepin, who was called for the prisoner.

On the 2nd June, 1903, the Court gave the desired leave (ante 488), and the case was argued on the 14th September, 1903.

E. E. A. DuVernet, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—As we are of opinion that on the second question the prisoner is entitled to a new trial, we do not deal with the first question. It is one that is not likely to arise again, and, as it is conceded that the utmost relief that the prisoner is entitled to in any event is a new trial, it is not necessary to deal with it in order to the disposition of this appeal.

On the other branch of the appeal we are of opinion that the prisoner's counsel should have been allowed to re-examine the witness Pepin upon the statement, made by him upon cross-examination by counsel for the Crown, of what the prosecutor Larocque said to him the day after the alleged shooting, about the prisoner being the person who shot at him. In his testimony at the trial the prosecutor, Larocque, fixed the time at which the shot was fired as 7.30 o'clock in the evening of Sunday the 1st March, 1903, and swore that the prisoner was the person who shot at him. Pepin testified in chief that at 7.15 that evening he had seen the prisoner and conversed with him at the corner of Friel and St. Patrick streets, about three-fourths of a mile from the place where the shot was fired. On cross-examination by counsel for the Crown, in reply to a question of what person he had first talked to about seeing the prisoner on the Sunday evening, he said he talked with Larocque. Asked, "when," he said, "The day after Larocque came to me and said Noel had shot him. I said, what time was it? He said, half-past seven. I said I saw Noel at the corner of Friel street." The counsel for the Crown allowed the matter to rest there.

It can scarcely be doubted that the statement so made was likely to produce an impression on the minds of the jury unfavourable to the prisoner as tending to substantiate the prosecutor's testimony.

The prisoner's counsel desired to re-examine with respect to it, but was not allowed to do so, on the ground that no foundation had been laid for doing so. The prisoner's counsel submitted that he was entitled to ask the witness on re-examination with regard to what was brought out in cross-examination, but the question was ruled out.

As the evidence stood at that time, we think the re-examination should have been allowed. No doubt, what Pepin had stated was in strictness not evidence, but the jury were not aware of that. It had come from him in the course of cross-examination, and counsel for the Crown had not asked that it should be struck out; nor were the jury informed that it was not evidence, and that they must disregard it. That being so, the prisoner was entitled to get, by further examination, every part of the conversation that related to the statement concerning the prisoner being the person who shot at the prosecutor. It was argued for the Crown that the witness volunteered the statement, and that in any case it was not evidence.

The right to re-examine follows upon the exercise of the right to cross-examine, and even if inadmissible matters are introduced in cross-examination, the right to re-examine remains—and the rule holds good where the witness volunteers the statement. If it was desired to avoid re-examination upon it, it should have been expunged at the instance of the Crown. While it remained as part of the testimony, the right to re-examine upon it also remained. In *Blewett v. Tregoming*, 3 A. & E. 554, where the point was fully argued, all the Judges agreed that, however the evidence came in during the cross-examination, whether voluntarily or in answer to a question by counsel, the other party was entitled to pursue it on re-examination, unless the cross-examining party got it struck out. See also *Phipson on Evidence*, p. 454.

We cannot judge of the effect that the statement, unqualified by other portions of the same conversation, or by any explanation, may have had on the minds of the jury, nor estimate to what extent it may have prejudiced the prisoner. There was, no doubt, other evidence as to the identity of the prisoner on which the jury might have convicted without reference to Larocque's evidence on that point, but, in view of the way in which the statement came out in Pepin's testimony, and of the discussion on the question of re-examination, the jury were not unlikely to have attached considerable importance to it.

We think, therefore, that there should be a new trial.

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SEPTEMBER 22ND, 1903.

DIVISIONAL COURT.

TODD v. TOWN OF MEAFORD.

*Railway—Municipal Corporation—Expropriation of Land—
Agreement with Land Owner—"Without Prejudice"—
Possession—Compensation—Damages—Action—Arbitra-
tion—Costs.*

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J., ante 12, in so far as it was in favour of defendants in an action against the town corporation and the Grand Trunk Railway Company for compensation for lands taken and for injury to lands.

It was proved that the provisions of sec. 121 of the Railway Act, 1888, empowering the construction of branch lines by existing railway companies had been complied with by the deposit of plan, profile, and book of reference of the lands intended to be taken, in the registry office of the county, and that the same had been approved by the Railway Committee. After this, and pursuant to the provisions of the special Act 63 Vict. ch. 77 (O.), the defendants negotiated with the plaintiff for the acquisition of the land he owned, which was depicted on the plan, with the result that an agreement was entered into on the 3rd October, 1900, between the plaintiff and the railway company, by which he agreed to sell and convey to the company the piece of land required for the work, for \$500. Those acting for the town corporation were not willing to give more than \$200, and it was then stipulated in the agreement that "in the meantime (i.e., till this term of the agreement as to price was settled) the plaintiff consented to the company proceeding with their works on the land "without prejudice to the said Todd." The railway company forthwith entered upon the land and prosecuted

their operations, but no agreement was reached as to the price. This action was then brought.

G. H. Watson, K.C., for plaintiff.

R. C. Clute, K.C., for defendant town corporation.

G. F. Shepley, K.C., for defendant railway company.

THE COURT (BOYD, C., FERGUSON, J.), held that the plaintiff's consent to the railway company proceeding with work on the land (though "without prejudice") precluded him from suing as in trespass. The taking possession became a rightful act, and it was not to prejudice plaintiff in getting proper compensation. But the method of ascertaining compensation was to be restricted to the statutory proceedings, which preclude a right of action in the ordinary manner. *Knapp v. London, Chatham, and Dover R. W. Co.*, 2 H. & C. 212, *Jones v. Stanstead, etc., R. R. Co.*, L. R. 4 P. C. at p. 115, and *Parkdale v. West*, 12 App. Cas. 602, referred to.

On the merits, sufficient compensation was not awarded by the judgment in appeal, as nothing was allowed for the severance of the land, and the price was not so liberal as is usual in compulsory acquisition of land, but it was not open to award more in this action as against the railway company. The judgment deals with the money paid into Court by the town corporation and declares this to be sufficient compensation. The judgment should direct that amount of money to be paid on account of the plaintiff's claim, without prejudice to his prosecuting proceedings for further recovery from the company, if so advised, and with this qualification the appeal should be dismissed without costs. There appeared to be no cause of action against the town.

SEPTEMBER 22ND, 1903.

C.A.

LAISHLEY v. GOOLD BICYCLE CO.

Master and Servant—Dismissal of Servant—Damages—Loss of Anticipated Commissions on Sales of Goods—Subsequent Employment during Period Originally Contracted for.

Appeal by plaintiff from judgment of FERGUSON, J. (1 O. W. R. 566. 4 O. L. R. 350) dismissing action for breach of contract and wrongful dismissal of plaintiff from the employment of defendants as an agent for the sale of bicycles.

G. H. Watson, K.C., and R. D. Moorhead, for appellant.
W. Nesbitt, K.C., and H. S. Osler, K.C., for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.), was delivered by

GARROW, J.A.—The action was brought upon a contract in writing, dated 23rd December, 1897, made between plaintiff and defendants, the material provisions of which are as follows: the defendants thereby employed the plaintiff as manager of the defendants' business (which was that of manufacturing and selling bicycles), and particularly of the sales and collections department of the defendants' business, to be carried on in a certain limited and specified territory within the Provinces of Manitoba, Ontario, Quebec, Nova Scotia, and New Brunswick, with the option to the defendants at the end of the first year to extend the territory over which the plaintiff was to act, so as to include the whole Dominion—an option afterwards duly exercised.

The term of employment was to be for three years from 1st January, 1898; the defendants agreed not to sell or assign any bicycles to any person except the plaintiff, to be brought into the said territory for sale; the plaintiff agreed to organize the defendants' business throughout the whole of the said territory, and in so doing and in carrying on the same, after organization, was to adopt and maintain the system employed by the Singer Manufacturing Co., with such modifications thereof from time to time as might be in the interests of the defendants; the plaintiff was to select and appoint the necessary agents, etc., throughout the said territory, and arrange salaries, with power to dismiss and reappoint such agents, etc.; he was to travel throughout said territory from time to time and exercise personal supervision over the whole territory and the persons in the employment of the defendants, and to devote his whole time and attention to the business of the defendants, except two weeks in each year for a holiday. The plaintiff's headquarters were to be at the city of Toronto, subject to removal at the end of the first year, at the option of defendants, to the city of Brantford, where defendants' factory was situated. The business at Toronto and elsewhere throughout the said territory was to be transacted in the name of the defendants; remittances from customers were to be made to the defendants in their name to the office at Toronto under the plaintiff's management until the removal to Brantford, and out of the moneys received the plaintiff was to pay expenses, and he was to remit the balance to the defendants by depositing such balance in

a chartered bank at Toronto to the defendants' credit. Plaintiff's remuneration was to be, first, a salary of \$20 per week; second, a commission of 5 per cent. on the net cash remittances from time to time made by the plaintiff to the defendants as thereinbefore provided; and, third, a premium of 50 cents on each bicycle sold or leased within the said territory during the said term; and all his travelling expenses were to be paid by defendants. But in case of the defendants exercising the option to extend the territory (as they did) the plaintiff's remuneration was to be 3 per cent. instead of 5 per cent. upon net remittances, and no premium on the sale or lease. The plaintiff's remuneration was to be paid weekly, and might be deducted by him out of the defendants' money in his hands. The defendants agreed to supply to the Goold Bicycle Co., Limited, Toronto (i.e., the Toronto office under plaintiff's management) bicycles and parts thereof, sufficient from time to time to fill the orders obtained by the plaintiff and the other employees of the defendants, within the said territory, unless the defendants were prevented from so doing by strikes or accidents or other causes entirely beyond the defendants' control. The contract contained no provision for the determination by either party of the employment during said term of three years.

The plaintiff entered upon the employment and remained therein until the 17th November, 1899, when he was dismissed by the defendants. The only reason assigned for the dismissal was that the defendants had sold their business, and for this reason did not require the plaintiff's services any longer. The sale by defendants of their business was made in the form of an amalgamation or combination with four other similar companies, the new company taking over the factories and other assets of the defendants, except the outstanding book debts, etc., and in the new company so formed the plaintiff was, upon his dismissal by the defendants, at once employed at a fixed salary of \$3,000 per annum.

Ferguson, J., found all the facts, properly I think, in favour of the plaintiff. He held that the plaintiff was entitled to the \$20 per week for the full period of three years, and to the commission of 3 per cent. upon the amounts in respect of sales made in the year 1899, but he disallowed the plaintiff's claim for damages in respect of the amounts payable as commission which he would presumably have received from the sales after his dismissal down to the end of the term. . . .

I am, with deference, unable to agree with the conclusions of the learned Judge disallowing all damages in respect

of the commission on prospective sales during the balance of the term.

By the terms of the contract the plaintiff was bound to serve for three years. He had served for almost two-thirds of the period, and his earnings in commission during the actual service are proved, and amount to a large sum, so large indeed as to clearly shew that from that source, and not from his fixed salary of \$20 per week, he was to derive the chief consideration on his part for entering into the contract. This is also indirectly shewn by the fact that immediately after his dismissal he was employed by the new company at the large fixed salary of \$3,000. It would be at least an illogical result to hold the defendants liable for the \$20 per week, and to relieve them from a much larger sum in commissions, a result to be struggled against, in my opinion, as not merely illogical but wholly unjust to the plaintiff.

The breach is clear, and admitted, and the only reason, apparently, for not permitting the ordinary consequences of adequate damages being awarded to the plaintiff, is because such damages are, it is said, too vague and conjectural, which is the question to be determined on this appeal.

Damages very seldom are capable of exact calculation, and yet I think many cases can be found in which damages have been awarded where the basis for a calculation was less certain than in this case. To begin with, there is the undisputed fact of the plaintiff's past earnings from commissions in 1898 and 1899; certainly some evidence of what he would probably have earned in 1900, and, indeed, in my opinion, strong evidence, unless affected by counter-evidence on the part of the defendants to shew that these past earnings were abnormal, or that the business had depreciated or come to an end. But we have here not merely the past earnings, but the fact that the bicycle business was continued under the new company after plaintiff's dismissal during the year 1900, but with, it is said, a diminished market. The manager for the new company puts this depreciation at about 40 per cent. of the previous year's demand; and another witness called by the defendants, at about 50 per cent. Giving credit to these witnesses, it appears to me that there is proper and even sufficient material for a reasonably correct calculation of the amount of the damages in question to which the plaintiff is entitled, having regard, of course, to what the situation and outlook were at the time of the breach in November, 1899, and which damages I would fix, after making all just deductions, at \$1,000, for which he should, in my opinion, have judgment.

There are in the American cases relied on by the learned Judge at the trial, all of which I have carefully perused, doubtless expressions of opinion which in themselves, and as applied to the facts in this case, would uphold his conclusion as correct.

On the other hand, I find authoritative decisions in the English reports which, it appears to me, in their facts are practically identical with the facts in the present case, in which plaintiff's legal right to recover is established.

Reference to *Rhodes v. Forwood*, 1 App. Cas. 256; *Turner v. Goldsmith*, [1891] 1 Q. B. 544; *Ogdens v. Nelson*, [1903] 2 Q. B. 57.

But the State decisions relied on do not, I think, represent a general rule of decision recognized even in the United States.

For instance, in a work often referred to and cited, the American and English Encyclopædia of Law, 2nd ed., vol. 20, p. 39, I find this summary of the law under the head of "Master and Servant," "Where damages consist of profits lost," "Where the contract has been wrongfully terminated by the master, and the resultant damages, if any, consist in profits lost, such profits are the proper measure of damages, and are recoverable if the evidence furnishes reasonable data upon which to base them; if, however, the employee has never performed any service under the contract, and there is no proof upon which such profits can be estimated, they are deemed too remote and speculative to constitute the basis of a recovery"—which seems to me to be a fairly accurate working definition, although much must always depend upon the nature of the contract, and the facts appearing in each particular case.

Upon the whole I am of the opinion that the plaintiff's appeal should be allowed with costs, and that he is entitled to judgment against the defendants for \$1,000 and the costs of the action.

CARTWRIGHT, MASTER.

SEPTEMBER 23RD, 1903.

CHAMBERS.

BROWN v. HAZELL.

Venue—Laying in Wrong County—Rule 529 (b)—Opposition to Change—Fair Trial—Prejudice—Jury—Costs of Motion.

It was admitted that the cause of action, if any, arose in the county of Wentworth, where also the parties resided.

The plaintiff having named Toronto as the place of trial, the defendants moved under Rule 529 (b) to change it to Hamilton.

G. C. Thomson, Hamilton, for the defendants.

M. Malone, Hamilton, for the plaintiff.

THE MASTER.—It was argued that sufficient grounds were shewn in the plaintiff's affidavit to authorize the dismissal of the motion. Plaintiff has also offered to bear any extra expense occasioned by a trial at Toronto. He alleges that the business of the defendants is so large that "the number of farmers in the county of Wentworth with whom the defendants do not trade or do business is small, while their customers both in the city of Hamilton and in the county of Wentworth are very many;" that consequently the defendants are "personally known to the great bulk of the farmers of the county of Wentworth, as well as to a large portion of the inhabitants of Hamilton." For those reasons he alleges that "it would be almost an impossibility to get an impartial jury to try this action at the city of Hamilton."

A similar question came before me in *Town of Oakville v. Andrew*, 2 O. W. R. 608, and I refer to what was said there on p. 609.

The present case is very much stronger for the defendants. The population of Wentworth is at least four times that of Halton. It cannot be presumed that out of 80,000 persons, of whom many hundreds must be on the jury panels, twelve cannot be found to give an impartial verdict. . . .

The venue must be changed from Toronto to Hamilton. The costs of this motion must also be to the defendants in any event, because naming Toronto as the place of trial was a violation of Rule 529 (b). I would repeat what I said long ago in *Murphy v. Township of Oxford* (affirmed on appeal by the Chancellor on 25th January, 1897, not reported), that in cases coming under Rule 529 (b) the duty of the plaintiff's solicitor is to conform thereto. For, in the first place, the action may eventually be settled before trial, and, even if not settled, the plaintiff has no right to impose on the defendant the burden of moving to restore the venue to what is *prima facie* the right county town.

If the plaintiff thinks he can make out a case, he should proceed under Rule 529 (d), and assume the onus himself, instead of trying to throw it on the defendant.

CARTWRIGHT, MASTER.

SEPTEMBER 23RD, 1903.

CHAMBERS.

BECKER v. DEDRICK.

Particulars—Statement of Claim—Information for Purpose of Pleading—Sufficiency of Particulars already Delivered—Trial—Examination for Discovery.

This action was brought to set aside a judgment on which a writ of fi. fa. was issued in 1891, and to set aside a sale made thereunder of a steam barge belonging to plaintiff, and also to set aside an alias fi. fa. issued under the same judgment on the 22nd February, 1902.

The defendants moved for an order for particulars, but, after service of the notice of motion, the plaintiff delivered particulars pursuant to a previous demand. Defendants, not being satisfied with the particulars delivered, pressed the motion.

H. L. Drayton, for defendants.

L. F. Heyd, K.C., for plaintiff.

THE MASTER referred to Spedding v. Fitzpatrick, 38 Ch. D. 410, and Odgers on Pleading, 5th ed., pp. 173, 178; and continued:—

Conceding that the particulars in the present case are not very artistically framed, can it be said that the applicant cannot tell what is going to be alleged, and if possible proved, against him? The main foundation for the action is the definite allegation in paragraph 4 of the statement of claim that plaintiff was never served with a writ of summons. If this can be proved, the judgment is irregular, and all proceedings founded thereon would be certainly voidable, apart from the question of lapse of time.

Then as to dates of sale of the barge, as well as of all the other proceedings, these are or should be matters of record in the Court itself, and can easily be ascertained by the defendants. . . .

I confess that I do not see how I can say that I am satisfied that the defendants cannot tell what is going to be proved against them.

In view of the decision of Meredith, C.J., in *Uda v. Algoma Central R. W. Co.*, 1 O. W. R. 246, I think the motion should be dismissed. On examination for discovery defendants will be able to obtain all the information they require for the trial. At present they have enough to enable them to plead, and that is all particulars are for: *Smith v. Boyd*, 17 P. R. at p. 467. . . .

I therefore think that the motion should be dismissed with costs in the cause to plaintiff. If, after discovery made, defendants still think there is ground for renewing their demand, they may do so. . . .

CARTWRIGHT, MASTER.

SEPTEMBER 25TH, 1903.

CHAMBERS.

MOFFATT v. LEONARD.

*Security for Costs—Residence of Plaintiff out of Ontario—
Assets in Jurisdiction—Costs of Motion.*

Motion by the defendant for security for costs, on the ground that plaintiff resides out of Ontario (Rule 1198 (a)).

C. A. Moss, for the motion.

A. W. Ballantyne, for plaintiff.

THE MASTER.—There was sufficient proof of assets within the jurisdiction to defeat the motion, but I reserved judgment on the question of the costs to see if defendant rightly brought the motion or not.

This depends on whether plaintiff is a resident out of Ontario. . . . The plaintiff is manager of a joint stock company, carrying on business in Ontario and having its head office at Woodstock. The plaintiff's wife and family reside in Woodstock. He is agent of the company at Detroit, but visits his family, as it is set out in defendant's affidavit, "once a fortnight and sometimes once a month, which visits generally extend over a Sunday only, and not as a rule for a longer time than a day and a half." The plaintiff does not qualify this any further than by saying he has resided in Woodstock for past 18 years and still considers it his fixed place of abode. Neither party was cross-examined.

Applying the decision in *Nesbit v. Galna*, 3 O. L. R. 429, 1 O. W. R. 218, to this case, I think the plaintiff is a resident in Ontario. . . . The converse is to be found in the present case. It is my opinion that the plaintiff's ordinary place of residence is at his wife's home in Woodstock, and that his residence in Detroit is merely temporary.

To hold otherwise would render many citizens of Ontario non-residents in such a sense as would require them to give security for costs in any case in which they were plaintiffs (or possibly defendants counterclaiming).

The motion is dismissed—costs in the cause.

FALCONBRIDGE, C.J.

SEPTEMBER 25TH, 1903.

BUCKINDALE v. ROACH.

Security for Costs—Costs of Former Action Unpaid—Instructions Given by Same Plaintiff—Action Brought in Name of Wrong Person—Form of Order.

On settling the order pronounced by the Master in Chambers, ante 775, it was confined to an order for security for costs with a stay of proceedings, plaintiff not being allowed the option of paying the costs of the former action.

Plaintiff appealed from the order.

S. B. Woods, for the appellant.

J. W. McCullough, for the defendant.

FALCONBRIDGE, J., affirmed the order of the Master as originally pronounced, varying the order as drawn up and issued by giving the plaintiff the option of paying the costs of the former action. Costs in the cause.

MACMAHON, J.

SEPTEMBER 25TH, 1903.

TRIAL.

DORAN v. McLEAN.

Way—Claim to Right of Way—Evidence—Dedication—Way of Necessity—Trespass—Injunction—Damages.

Action for trespass to land. Defendant claimed a right of way through the land in question, which was vested in fee in Martin Casselman at the time of his death in 1881. During his lifetime those engaged in lumbering operations in the vicinity passed through there occasionally during the winter months, and some of them passed through without molestation from him, but a barrier was placed by him along this piece of land which prevented the use of it as a highway by anyone, unless the barrier placed there by Casselman was removed.

C. G. O'Brian, L'Orignal, and W. S. Hall, L'Orignal, for plaintiff.

J. Leitch, K.C., for defendant.

MACMAHON, J., held on the evidence that Casselman never intended to dedicate that land to the public as a highway.

Not only so, but he compelled those who attempted to use it to pay for its use, even in the winter, shewing that he was not providing a highway for the public. Casselman's sons, who were the devisees under his will, after his death partitioned the estate among them. The language of the partition deed shewed that this land was excepted out of a tract of 400 or 500 acres for the joint benefit of those owning the several portions, as a roadway. This defendant had no rights there. The roadway was not appurtenant to the land now owned by him. It was not a way of necessity, because it was shewn that from the land which defendant owns there is a way out to the government highway leading to his market town, the village of Casselman. Judgment for plaintiff for \$5 damages and an injunction restraining defendants from further trespassing on this property, with costs.

SEPTEMBER 25TH, 1903.

C.A.

DAWDY v. HAMILTON, GRIMSBY, AND BEAMS-
VILLE R. W. CO.

Street Railways—Injury to Person—Conductor Attempting to Pull Person on Moving Car—New Trial—Discretion—Interference.

Appeal by defendants from order of a Divisional Court, 5 O. L. R. 92, 1 O. W. R. 781, directing a new trial.

Action to recover damages for an injury received by plaintiff owing to alleged negligence of defendants.

The jury found that the plaintiff's injury was caused by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently, and assessed plaintiff's damages at \$650.

The trial Judge dismissed the action on the ground that in endeavouring to pull on a car a person who was merely standing on the platform and not attempting to get on, the conductor was not acting within the scope of his duty as the servant of defendants: *Coll v. Toronto R. W. Co.*, 25 A. R. 55.

In the Divisional Court *BOYD, C.*, was of opinion that the case had not been fully tried by the jury; that a question as to the scope of the conductor's authority should have been submitted to them. The other member of the Divisional Court, *MEREDITH, J.*, agreed that there should be a new trial, being of opinion that there was some evidence of negligence.

E. E. A. DuVernet, for defendants, appellants.

W. M. German, K.C., for plaintiff.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.), declined to interfere with the discretion exercised by the Divisional Court in granting a new trial.

CARTWRIGHT, MASTER.

SEPTEMBER 26TH, 1903.

CHAMBERS.

DELAP v. CODD.

Writ of Summons—Service in Ontario on Defendant Resident out of the Jurisdiction—Appearance—Plea to the Jurisdiction—Dismissal of Action—Frivolous or Vexatious Action—Master in Chambers—Rule 261.

Motion by defendant Armstrong to set aside the proceedings against him in this action, on the grounds: (1) that he was improperly described in the writ of summons as being of the city of Ottawa, while to the knowledge of the plaintiffs he was resident in Montreal, in another Province; (2) that the writ and statement of claim shew no such cause of action as to give jurisdiction as against him to any Court in Ontario.

J. H. Moss, for defendant Armstrong.

W. E. Middleton, for plaintiffs.

THE MASTER.—As to the first ground, I think it is disposed of by *Smith v. Hammond*, [1896] 1 Q. B. 571. To the same effect is *Snow's Annual Practice*, 1902, vol. I., p. 6, and *Western v. Percy*, [1891] 1 Q. B. 304, at p. 310. In any case the defendant was served in Ottawa. This would give the Court jurisdiction, as I understand the judgment of Osler, J.A., in *Murphy v. Phoenix Bridge Co.*, 18 P. R. at p. 497, and citations there given.

The defendant, then, having been properly served, is bound to appear. Having done so, he will be at liberty to set up as a defence any question of jurisdiction over the subject matter of the action, as he may be advised.

This was so held in *Wilmott v. Macfarlane*, 16 C. L. T. Occ. N. 83, decided in 1896 by the Queen's Bench Division.

The motion was also for an order to dismiss or stay the action as being frivolous and vexatious, and because it is sought to litigate matters which are pending before the Courts in England.

On this branch I do not express any opinion. As I understand the Rules on this subject, such a motion must be made before a Judge of the High Court: see Rule 261; Brophy v. Royal Victoria Ins. Co., 2 O. L. R. 651; McAvity v. Morrison, 1 O. W. R. 552. . . .

In my opinion, the motion fails and must be dismissed. The defendant should appear forthwith, and file his defence within a week or such other time as may be agreed on. This is to be without prejudice to any steps which defendant may thereafter think fit to take under Rule 261. Costs to plaintiffs in the cause.

TRETZEL, J.

SEPTEMBER 26TH, 1903.

RE HUNTER.

Will—Construction—Shares of Children of Testator—Period of Vesting—Rents—Interest—Equal Division.

Motion by executors under Rule 938 for an order declaring construction of will of Edwin Hunter.

By paragraph 2 of his will the testator bequeathed and devised all his property, both real and personal, to his executors upon trust: (sub-sec. 1) to make certain allowances and payments to his wife; (sub-sec. 2) within four years after his decease to convert all his estate, except the homestead residence, into cash, and out of the proceeds to retain and invest sufficient towards the payments to his wife, and the balance to divide equally amongst his five children, the share of his youngest son (Douglas Campbell Hunter) to be invested during minority, and the interest thereof, or so much as may be necessary, to be applied towards his maintenance and education, and the balance to be invested for his benefit; during said four years or while said property is unconverted, the rent and interest not required for payments hereinbefore directed, to be invested and to form portion of the corpus; (sub-sec. 3) upon the death or second marriage of his wife, the principal reserved for her benefit to be equally divided among the five children. By paragraph 3 the testator directed that the shares given to his children should vest in each of them immediately upon his decease, and that in the event of any of such children dying before receiving his or her share and leaving issue, the share of such child so dying should be divided equally among such issue.

A. H. Marsh, K.C., for executors.

George Bell, for Douglas Campbell Hunter, contended that under the latter clause of sub-sec. 2 of the second para-

graph of the will, no rents or interest should be paid out, except for the widow's annuity and for the payments directed to be made for the benefit of Douglas Campbell Hunter, until such youngest son should have attained 21.

A. G. F. Lawrence, for Mary E. Hunter and William R. Hunter.

TEETZEL, J.—. . . . The testator intended an equal distribution among his children, and that their shares should vest immediately upon his decease. The construction contended for by Douglas Campbell Hunter would be repugnant to this, and particularly to paragraph 3, which, being subsequent in the will, must prevail over any inconsistency therewith in clause 2 of sub-sec. 2 of the second paragraph. There should be a declaration that the shares vested at the testator's death, and that Douglas Campbell Hunter is not entitled to the benefit of more of the rents and interest moneys than are referable to his share of the principal. His application for an administration order is dismissed. Costs of all parties out of the estate.

TEETZEL, J.

SEPTEMBER 26TH, 1903.

RE SWEAZEY.

Will—Construction—Legacies—Interest—Testator in Loco Parentis to Legatees — Period from which Interest Runs—Realization of Estate.

Motion under Rule 938 by the Toronto General Trusts Corporation, trustees, for an order determining what interest, if any, is payable under the will of the late Andrew J. Sweazey on legacies of \$3,000 and \$500 respectively to his grandchildren Andrew J. Sweazey and Amanda E. Sweazey.

After making provision for payment of debts and funeral and testamentary expenses out of his personal estate, the testator devised his real estate for the benefit of his wife during her life, with a provision for good and sufficient board for his grandson Andrew while he lived with the testator's wife, until he should reach the age of 12, and directed that within three years next after his wiife's death his executors should sell the real estate, and, after providing for the payment of certain pecuniary legacies to his daughters, directed the balance to be divided equally between all his daughters, "reserving always from such division the sum of \$3,000 and the further sum of \$500 hereinafter bequeathed unto my grandson Andrew J. Sweazey and my granddaughter Amanda Emily Sweazey."

The gift to the grandson was in the following words: "I give and bequeath unto my grandson Andrew J. Sweazey the sum of \$3,000, to be paid to him when he shall have arrived at the age of 21 years, but in case of his death before he shall arrive at such age the said sum shall be equally divided among all my daughters."

The gift to the granddaughter was in similar language.

The testator died in 1875, and his widow in 1902.

The trustees had, pursuant to the will, converted the real estate into money.

The grandson attained 21 and died. His representatives and the granddaughter claimed interest on the legacies from the testator's death.

W. S. McBrayne, Hamilton, for the trustees.

A. L. Baird, Brantford, for the granddaughter and the representatives of the grandson.

J. G. Gould, Hamilton, F. R. Martin, Hamilton, and M. G. V. Gould, Hamilton, for residuary legatees.

TEETZEL, J.—. . . As regards the granddaughter, I do not think there is any evidence in the will itself or in the extrinsic evidence . . . to shew any intention on the part of the testator to place himself in loco parentis to her.

The question of whether a person has placed himself in loco parentis to a child so as to carry the moral obligation of maintenance, is one of intention: *Powys v. Mansfield*, 3 My. & Cr. 359. Having regard to the provisions made for the grandson, I think the testator's intentions in regard to his maintenance were limited to that provision.

After the children left the testator's home, they were voluntarily maintained by their mother, and I do not see how, in any event, the claim would now be made by them against the testator's estate for moneys paid by their mother for their maintenance.

Then as to the claim for interest on these legacies from the date the grandchildren respectively became twenty-one years of age, I am of opinion that interest cannot be allowed on either of these legacies until after the real estate was realized upon by the trustees.

While the legacies are bequeathed as payable at twenty-one, the governing provision of the will, it seems to me, is that the real estate, out of which the legacies could only be paid, should remain unsold for the enjoyment of the widow during her life, and that not until after the realization

thereof by the trustees within three years after the widow's death can these pecuniary legacies be paid.

Neither of these legacies could have been sued for and recovered during the widow's life, and there being no default, and interest being given for delay in payment, the same cannot be exacted before the time at which by direction of the testator there would be a fund out of which the legacies could be paid. Upon this question I think the case is governed by *Re Scadding*, 4 O. L. R. 632.

I therefore declare that interest on the said two legacies should be computed only from the time the trustees realized upon the real estate.

The costs of all parties should be paid out of the estate.

FALCONBRIDGE, C.J.

SEPTEMBER 26TH, 1903.

CHAMBERS.

O'CONNOR v. O'CONNOR.

Jury Notice—Leave to File—Interpleader Issue—Equitable Issue—Jurisdiction of Court of Chancery.

Appeal by plaintiff from order of Master in Chambers (ante 737) refusing plaintiff leave to file a jury notice.

T. F. Slattery, for plaintiff.

W. B. Raymond, for defendant.

FALCONBRIDGE, C.J.—The issue is whether the defendant is entitled absolutely to hold the beneficiary certificate and the money payable thereunder, or whether he holds the certificate only as security for money lent, and therefore is trustee for plaintiff of the balance. This is within the jurisdiction of the old Court of Chancery, and therefore ought to be tried by a Judge without a jury. Appeal dismissed with costs to defendant in any event.

CARTWRIGHT, MASTER.

SEPTEMBER 26TH, 1903.

CHAMBERS.

POSTLETHWAITE v. McWHINNEY.

Writ of Summons—Service out of Jurisdiction—One Defendant in Jurisdiction—Contract—Breach—Cancellation—Injunction—Parties—Trustee—Rule 162.

On 24th June, 1903, the plaintiff obtained an ex parte order for leave to issue a writ of summons for service out of

the jurisdiction. The plaintiff's affidavit on which the order was obtained stated that it was proposed to bring an action against two defendants, one of whom, McWhinney, resided in Ontario, and the other, Sarah Ann Postlethwaite, in England. The proposed action was to set aside an indenture under seal dated 31st March, 1903, to which plaintiff and defendants were all parties.

The writ of summons having been issued and served on the defendant Sarah Ann Postlethwaite in England, she made a motion to set aside all the proceedings against her, on the grounds: (1) that the material on which the order of 24th June was made was insufficient; and (2) that this case does not come within any of the clauses of Rule 162.

S. B. Woods, for applicant.

R. B. Beaumont, for plaintiff.

THE MASTER.—The motion was first supported on the assumption that plaintiff was invoking only the provisions of sub-sec. (g) of Rule 162. It was conclusively demonstrated that the order could not be sustained under that clause as a matter of right. Whatever doubts may have been entertained or suggested as to the meaning of the words "duly served," it is now clear from the decision in *Collins v. North British Co.*, [1894] 3 Ch. 228, that these words require an action to have been already commenced and service effected on the party resident within the jurisdiction. . . . *MacKay v. Colonial Investment Co.*, 4 O. L. R. 577, 1 O. W. R. 569, 592, 646; *Muir's Annual Practice*, 1903, p. 184.

Mr. Beaumont conceded that he could not rely on this ground, but he contended that he was clearly within the provisions of sub-secs. (f) and (e).

As to these I agree with the plaintiff.

Mr. Woods argued as to the claim of plaintiff for an injunction, that it was not mentioned in the affidavit of plaintiff on which the order of 24th June was granted, and . . . that this was to be regarded with suspicion, citing *De Bernales v. New York Herald*, [1893] 2 Q. B. 97 n. . . . There the claim for an injunction was added only by way of amendment. The action as originally framed was in respect of an alleged libel, and the claim for an injunction was considered an afterthought to bring the case within the Rule. Here, however, the claim for an injunction seems very appropriate, in view of the proceedings taken by defendant McWhinney against plaintiff in a Division Court, which proceedings are stayed by the indulgence of that Court until the present action

is determined. I do not think that it was necessary to state this claim in the affidavit. It is clearly ancillary to the claim for cancellation, and would be a not improper enlargement in the statement of claim of a special indorsement claiming the relief of cancellation.

Then as to sub-sec. (e). In *Comber v. Leyland*, [1898] A. C. 527, Halsbury, L.C., states the meaning of the corresponding English sub-section. . . .

In the present case it is not disputed that the contract was made in Ontario, and the payments were to be made there by plaintiff to the trustee for the benefit of plaintiff's wife. If, then, there had been default by plaintiff and he had gone away to Detroit, he could no doubt be sued here under this sub-section. I cannot, however, see that there is any breach by defendants or either of them. The acts of defendant Mrs. P. relied on by plaintiff as a ground of cancellation are not breaches of any contract made by her or her trustee. . . .

The final result of my consideration of the matter is this. I think the plaintiff comes well within sub-sec. (g). I do not see how it can be argued that McWhinney is not a necessary party to the deed under which he is trustee, and after his taking action as such against plaintiff in the Division Court. But there is the objection of the undoubted irregularity if this sub-section alone is relied on. As to this, if necessary, I do not think that plaintiff should be driven to the useless formality of a second service in England. . . .

But as to (f), I think, for reasons already given, that the order was properly made, even though the claim for injunction was not set out in the affidavit of plaintiff. Having regard to all the facts and that the granting of an order under this Rule is in the discretion of the Court (see per Meredith, C.J., in *Phillips v. Malone*, 3 O. L. R. 53, and per Lopes, L.J., in *De Bernales v. New York Herald*, [1893] 2 Q. B. 98 n.) I think the order was rightly made under sub-sec. (f). If necessary for plaintiff to rely on (g), I would validate the service, as no possible injury can have been done to defendants.

The costs will be in the cause, for the reason given in *MacKay v. Colonial Investment Co.*

The defendants should appear and defend within a reasonable time. The order will be in the same terms as in the *MacKay* case, if on examination the variation made by the Divisional Court is found appropriate.

FALCONBRIDGE, C.J.

SEPTEMBER 23RD, 1903.

CHAMBERS.

RE BLACK EAGLE MINING CO.

Sheriff—Right to Poundage—Goods Advertised for Sale but not Sold—Money “made” by Sheriff—Tariff C., Item 39—Possession Money—Amount of.

Appeal by the sheriff of Rainy River district from an order of the local Judge at Rat Portage. Some twelve executions against the Black Eagle Mining Company were placed in the sheriff's hands, and he seized personal property belonging to the company. A portion of this was sold for \$2,200, and the right to poundage in respect to this amount was not disputed. He advertised other property for sale, but, pending an application for a winding-up order, he was directed to stay and did stay the sale until the 30th March. No settlement having been arrived at, the property was again advertised for sale for the 4th April. On the morning of that date the solicitor for the company came to the sheriff, and, in order to prevent the sale being proceeded with, paid to him the balance due upon the executions (less the sheriff's fees), amounting to \$16,000, or thereabouts. The sheriff claimed poundage upon this amount, which claim was disputed, and the defendants brought the matter before the local Judge under Rule 1192. The Judge, however, did not act upon this Rule, because he held that the money paid to the sheriff was not “made” within the meaning of item 39 of tariff C. attached to the Consolidated Rules, and that therefore the sheriff was only entitled to such allowance as might be made by the Judge under Rule 1190. The sheriff appealed from this decision. The company also cross-appealed on the ground that the local Judge should not have allowed more than \$1.25 per day possession money.

W. M. Douglas, K.C., for the sheriff, contended that the money paid to the sheriff under the executions was “made” within the meaning of the tariff, citing *Thomas v. Cotton*, 12 U. C. R. 148; *Consolidated Bank of Bickford*, 7 P. R. 172; *Morrison v. Taylor*, 9 P. R. 390; and other cases. The old statute required the money to be “levied and made,” but even in such cases the statute would be satisfied where the money was paid to the sheriff after the property had been seized and advertised for sale.

N. W. Rowell, K.C., for the company, contended that the sheriff was not entitled to poundage unless he levied the

money pursuant to the direction in the writ of execution, and to levy the money it was necessary to make a sale of the goods seized, citing *French v. Lake Superior Mineral Co.*, 14 P. R. 541; *Weegar v. Grand Trunk R. W. Co.*, 16 P. R. 371. On the cross appeal he contended that under the case of *Hay v. Drake*, 8 P. R. 122, not more than \$1.25 could be allowed.

FALCONBRIDGE, C.J., held, following *Thomas v. Cotton*, 12 U. C. R. 148, and *Consolidated Bank v. Bickford*, 7 P. R. 172, that the money in question had been "made" by the sheriff within the meaning of that word as used in tariff C., relating to sheriffs' fees, and that the sheriff thereupon became entitled to full allowance of poundage as provided by the statute. He held that the matter, therefore, did not come within Rule 1190, and that nothing appeared in the circumstances of the case to justify a reduction of the sheriff's poundage, as such jurisdiction only arises under Rule 1192 when such poundage appears to be unreasonable. He further held, on the cross-appeal, that *Hay v. Drake* does not decide that the amount of possession money to be paid by the sheriff to a man in charge of the goods seized is limited to \$1.25, but that the sheriff is entitled to pay such sum as is reasonable, and that the sum paid in the present case, \$2.25 a day, was not an unreasonable amount to pay, considering the situation of the property seized in the district of Rainy River.

Appeal allowed with costs and cross-appeal dismissed with costs.

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FERGUSON, J.

SEPTEMBER 24TH, 1903.

CHAMBERS.

ROBERTS v. CAUGHELL.

*Report—Necessity for Confirmation—Sale under Judgment
—No Bidders.*

Appeal by defendant from two orders of a local Judge made on the 8th September, 1903.

One of the orders professed to confirm a report on sale, dated the 4th September, 1903, but was not made upon the consent of the defendant, and the other appointed a new day for redemption and directed foreclosure in default of redemption.

E. Meek, for defendant.

F. E. Hodgins, K.C., for plaintiff.

FERGUSON, J.—The report on sale made by the Master at St. Thomas and dated the 4th September, 1903, though a report that there was no sale for want of bidders, was a report that might have been appealed from, and one that required confirmation. It was admitted that the order professing to confirm the report was bad; and that being so, the order for foreclosure was bad also, the report not being confirmed.

Appeal allowed with costs.

MACMAHON, J.

SEPTEMBER 28TH, 1903.

TRIAL.

KENT v. ORR.

*Timber—Agreement for Sale—What Passes under—Trespass
—Injunction—Reference—Damages.*

Action to recover damages for trespass and cutting and removing timber from part of lot 13 in the 9th concession of the

township of Medonte, in the county of Simcoe; and for an injunction restraining the defendant, his agents and servants, from entering upon and removing or cutting timber on said land; also for an order setting aside an assignment, or transfer, by William E. Irish to the defendant, dated the 24th October, 1902, of all timber, wood, and trees standing upon the said lot; and also for a direction that the registration of the said assignment be vacated.

H. Lennox, Barrie, for plaintiff.

E. F. B. Johnston, K.C., and F. C. Jarvis, for defendant.

MACMAHON, J.—The plaintiff became owner of the lot forty-five years ago, and said that in August, 1871, when the lot was in a state of nature and wooded with pine, oak, elm, basswood, whitewood, spruce, tamarac, and cedar, he sold the pine and the oak timber on the lot to Zachariah Casselman for \$1,000, \$200 being paid in cash, and the balance—\$800—being payable when Casselman had removed the pine and oak. There was no time mentioned within which the timber was to be removed. At that time the pine and oak comprised the only timber of any value; and Casselman cut all that he considered suitable for his purpose during the winter of 1871-2, and then paid Kent the balance of the purchase money, \$800. The plaintiff stated that after Casselman paid the \$800 he wanted to sell the timber then remaining on the land to him (Kent), but he would not purchase, and Casselman then sold to Gregoire Yon.

The plaintiff and Casselman both said that there was no written agreement between them when the sale took place, and that only the pine and oak were sold. Casselman sold his interest in the timber remaining on the land to Yon, in 1872, for \$250. Yon (whose evidence was taken under commission) said that Casselman at the time of the sale produced and read to him an agreement purporting to be between Kent and Casselman for the sale to the latter of all the timber on the lot, and that the agreement as read by Casselman purported to be signed by Casselman and Kent; and that there were receipts sent by Kent for the \$200 and the \$800 on the paper produced. He said Casselman wrote—at the foot of the agreement between Kent and Casselman—an assignment of his interest in the timber to him (Yon). Yon, who could not read, said that after he had purchased his son read the agreement over to him several times. Yon took pine and oak off the property during the winters of 1874-5 and 1875-6. In 1878 or 1879 Yon sold and assigned his interest in the timber remaining on the lot to Thomas Blaney, the consideration being a set of harness and \$15. Yon said he gave to Blaney

the agreement between Kent and Casselman, and the assignment from Casselman to himself; and Blaney said he had the paper until about 1889, when it was lost or destroyed; and that during the time it was in his possession he kept it in an envelope, but looked at it four or five times during the period. He stated it had the signature of George L. Kent to it, which he said resembled the signature of the plaintiff to the affidavit on production sworn by him and filed in this cause.

Blaney shortly after getting the assignment from Yon took 360,000 pine shingle bolts off the lot, besides cordwood for his own use. And in 1885 or 1886 John Robins asked Blaney what timber he owned on the place, and Blaney said the oak and pine, which he sold to Robins for \$200, giving him two years in which to remove the timber. Robins did not remove the whole of the pine and oak, as the time limit was too short.

From the evidence of Robins and of nearly every other witness called, the tamarac, hemlock, and cedar on the place ten years ago was of little or no value.

William E. Irish went into possession of part of the lot as tenant of the plaintiff, Kent, in 1880, under a clearing-lease, and cleared sixteen acres. At the time he went on he said that Kent had cleared between 35 and 40 acres of the land.

According to the statement of Irish he commenced to cut timber in 1890, when Blaney (who is his brother-in-law) forbade him cutting any more. Irish then saw Kent, and wanted to buy some of the timber, and Kent, he said, told him that all the timber belonged to Blaney. He then saw Blaney again, when Blaney said if he would cut down the one original pine tree then on the lot, and draw the logs cut therefrom to the mill, he could have the remaining timber on the land. Between the time that Irish entered into this agreement with Blaney and the 1st October, 1902, Irish had taken off and sold 160 cords of hardwood. I find as a fact that for seven winters in succession Irish, while taking off timber, paid Kent for it each year by ploughing on his land and cutting firewood for his (Kent's) use. And that each year a different bargain was made.

During the time Irish was cutting the timber the plaintiff, Kent, was selling timber off the land to other persons. In 1882 he sold to Robert Parker the cedar and balsam on the lot for \$100, giving him three years in which to get it out. Parker cut timber for one year only. Kent also sold to George Dunlop the right to cut all the different kinds of timber during the years 1890 to 1897. What Dunlop took off was principally cedar, whitewood, spruce, and balsam.

At that time, Irish said to Dunlop that Kent was selling all the timber, and would not have enough to fence the place, but he (Irish) did not care, so long as he did not sell the pine, as that belonged to him.

Robert Young said that in 1892 he went on the place to cut rails, and Irish was there in the bush, and asked him what he was doing, when Young told him he was cutting rails. Irish said he could take any cedar he wanted, as it was not his, but he must not cut any second growth pine, as that belonged to him. Young said there was at that time some very small second growth pine, varying from two to twelve inches, and one oak about eight inches in diameter.

Irish told Rowland Young he did not care what Kent did with the cedar, as he had no claim to it. And in 1890 Hawke bought balsam, spruce, and hemlock from Kent. Irish (who is Hawke's uncle) knew he was cutting, and asked him how he was getting along. At that time Irish made no claim to any timber but the pine; Blaney gave no written authority to Irish to cut timber.

On the 1st October Kent served a notice on Irish to deliver up possession of the land, and at the same time he caused notices to be posted up on the land forbidding any one trespassing or removing the timber therefrom. On the 18th October Irish purported to assign, by the agreement already referred to, all the timber on the land to the defendant, Orr. The price to be paid is not mentioned in the agreement, and, whatever the price was, it was not to be paid until Orr had removed the timber.

I find that there was a written agreement signed by Kent, when he sold to Casselman, and that it included the "timber" then on the land. As I have already stated, Casselman, as well as the plaintiff, denied that there was any writing; but the plaintiff admitted having signed a leaf in a book as to the sale and purchase of the lot. What he signed may have been in the nature of a receipt, but containing the terms of the contract for sale. Casselman desired to purchase the oak and pine "timber," which was the only timber of any value to him, and the only timber he cut. That was the only kind of timber cut by Yon; and the pine for shingle bolts was the only "timber" cut by Blaney except cordwood for his own use. And, although the agreement included "the timber on the land," I would, having regard to the kind of timber Casselman at that time considered of any value, and which alone he removed, have been inclined to hold that it was not intended to include the cedar, but for the admission of Kent that about four years after he sold to Casselman he obtained

Casselman's consent to cut cedar for fencing. Casselman had at that time no interest in the timber, as he had in 1872 assigned his interest to Yon, but the admission of Kent shews that he considered the cedar as "timber" and as included in the contract. Casselman was called on behalf of the plaintiff, and denied that there was any agreement in writing, but said that he took a receipt for the money in a pass-book which he stated was afterwards worn out by being carried in his pocket.

Casselman was a most unsatisfactory witness. He admitted having made, on other occasions, statements regarding the contract differing from his statements in the box. He admitted having a conversation with Dr. McGill on the 30th April last, when Mr. Jarvis, the solicitor for the defendant, was present, and with Dr. McGill in August last, when Sylvester Campbell was present, and also Blaney and Orr. He denied telling Dr. McGill in April, 1903, that he had a written agreement from Kent and that he afterwards sold what remained to Yon; and said he did not remember telling Dr. McGill in August that he had bought all the timber on the lot from Kent, and that he afterwards sold what remained to Yon. He also denied that he told Blaney and Orr that Kent had signed the writings, and that he (Casselman) had prepared a document to take to Kent, and brought a witness with him to see it executed. Dr. McGill, Mr. Campbell, Blaney, and Orr were all called, and swore that these statements that Casselman denied making were made to them on the occasions deposed to in the evidence. The manner in which they gave their testimony satisfied me that the statements were made by Casselman to them, and that the evidence which he gave at the trial could not be relied upon.

I find that the agreement between Kent and Casselman was handed to Yon, and an assignment of Casselman's interest was executed by him to Yon, and that Yon afterwards assigned his interest to Blaney.

I find that Irish did not consider he was entitled under the assignment to him from Blaney to cut the cedar, white-wood, basswood, balsam, spruce, hemlock, etc. His claim was confined to the second growth pine and the oak; and "timber" under the contract would not include cordwood which he either removed surreptitiously or had Kent's authority to cut, the latter assuming he was cutting under the license he had given him (Irish).

I find also that Irish was aware, prior to 1890 and during all the subsequent years, that Kent was disposing of timber on the land to Parker, Dunlop, Rowland Young, Robert

Young, and others, already named, and that he acquiesced in what Kent was doing.

Then what would be included in the word "timber" in the contract between Kent and Casselman? In *Corbett v. Harper*, 5 O. R., the learned Chancellor said, at p. 97: "In this country I apprehend the term 'timber' would be properly applicable to whatever trees are used in building or the mechanical arts. Timber primarily means, 'wood fit for building.' See Latham's English Dictionary. In the Imperial Dictionary it is described as that sort of wood which is squared, or capable of being squared, and fit for being employed in house or ship building or in carpentry, joinery, etc. In *Nash v. Disco*, 51 Maine R. 417, the Court adopt as correct Webster's definition as that sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships, and the like. And it is there said that in a contract for the purchase of timber no title would be acquired by the purchaser to trees not suitable for any purpose but for firewood."

The Chancellor in his judgment adopts the rule of law laid down in *Aubray v. Fisher*, 10 East 446, and recognized in *Ireland in Dunn v. Bryan*, 7 Ir. R. Eq. 152, that when once a particular wood is ascertained to be timber it assumes the denomination of timber at twenty years' growth.

In *Whitty v. Dillon*, 2 F. & F. 67, it is said that only trees six inches in diameter or two feet in girth appear to be reckoned or considered as timber.

All trees of any kind which were saplings at the time of the sale in 1871 from Kent to Casselman, but which subsequently became timber, did not pass to the purchaser. And the trees which are only suitable for firewood, and which now form the principal wood on the property, could not be cut or removed by the defendant. In this country the pine, oak, cedar, whitewood, basswood, and ash, which in August, 1871, was twenty years old, the defendant would be entitled to cut, and may be removed within six months from the 1st day of November next.

There will be judgment for the plaintiff as to all the trees on the land suitable for cordwood, and for all spruce and tamarack, and for such of the pine, oak, cedar, whitewood, basswood, and ash as was not at the date named (1871) twenty years old. And there will be an injunction restraining the defendant from cutting or removing such named trees.

There will be a reference to a special referee, to be agreed upon by the parties, and, if not agreed upon, to be named by me, to ascertain what, if any, of the trees suitable for cordwood, or any pine, oak, cedar, whitewood, basswood, or ash,

which was not in August, 1871, twenty years old, or any spruce or tamarac, has been cut on the said premises by the defendant, and the value of such timber.

And the defendant may have a reference, at his own risk as to costs, as to what, if any, of the trees now standing on the said land were twenty years old, and therefore "timber," in August, 1871.

Further directions and costs reserved until after the report of the referee.

OSLER, J.A.

SEPTEMBER 28TH, 1903.

C.A.—CHAMBERS.

ALLEN v. CROZIER.

Appeal—Leave—Security for Costs—Discretion—Peculiar Circumstances—Solicitor.

Motion by defendant for leave to appeal from order of a Divisional Court (ante 736) affirming order of STREET, J., in Chambers, reversing order of Master in Chambers (ante 485), and setting aside a præcipe order for security for costs.

J. W. McCullough, for defendant.

T. H. Lloyd, Newmarket, for plaintiff.

OSLER, J.A.—I think that this diversion from the main channel of the litigation should go no further. It seems to me at least probable that the Court of Appeal would hold that it was open to the Courts below in their discretion to say that, under the peculiar circumstances, plaintiff ought not to be ordered to give security.

Defendant was plaintiff's solicitor when, as it is said, both the transactions to be investigated in this action occurred. One of these is an assignment of rents, absolute in form, but which, it seems clear—indeed it is not denied—cannot be sustained to that extent, and defendant has received under it and has in hand a considerable sum for which he must account to the plaintiff, as he says he is ready to do. Another relates to an assignment to defendant of certain Division Court judgments against plaintiff. These, it is said, defendant purchased while acting as plaintiff's solicitor, and can hold only to the extent of the sum he paid for them. It is true that this is to be determined in the action, but the circumstances under which the judgments were so acquired are such as might well be thought by the Court below to invite inquiry which a solicitor and officer of the Court ought not to

be allowed to impede by requiring his former client to give security for costs. Re Carroll, 2 Ch. Ch. 305, may be referred to.

Motion dismissed. Costs in the cause.

STREET, J.

SEPTEMBER 29TH, 1903.

TRIAL.

HAMILTON v. MUTUAL RESERVE LIFE INS. CO.

Life Insurance — Surrender of Policy — Inducement — Misstatements of Agent — Release — Subsequent Repudiation — Fraud — Trial of Preliminary Issue in Action on Policy.

Trial of a preliminary issue in an action by the personal representatives of Robert D. Hamilton, deceased, upon a certificate or policy assuring \$2,000 upon the life of the deceased.

J. P. Mabee, K.C., for plaintiffs.

W. Cassels, K.C., and Shirley Denison, for defendants.

STREET, J.—The insurance was effected on the 20th March, 1888, and the deceased died on the 19th July, 1902. In July, 1901, the policy was alleged to have lapsed for non-payment of a premium, but the deceased applied to have it reinstated in accordance with a condition contained in it; he was instructed to go to Dr. D. B. Fraser and submit to a medical examination, and answer in writing the questions contained in a printed form supplied to him. This he did, and he was informed that his policy had been reinstated, and subsequent premiums were accepted by the defendants upon his policy. In March, 1902, he applied to the defendants under another clause, called "the total disability clause," in his policy, for the immediate payment of \$1,000 on account of the sum insured. No decision upon this application was communicated to the deceased, but on 6th May, 1902, D. E. Cameron, a general claim agent of the company, instructed by the head office, called at the house of the deceased, and remained with him for some two or three hours, at the end of which time the deceased received from Cameron a draft on the company for \$500, in full of all his claims under the policy, and executed a release under seal which Cameron had already prepared, and he delivered the policy up to Cameron, who took it away. Within half an hour Cameron returned with Mr. McPherson, a solicitor and notary public, to whom the deceased in answer to questions stated that he knew he was releasing his policy of \$2,000, in consideration of the payment of \$500, and he added that he was glad to get rid of the company; that they

had been doubling up their rates on him, and had treated him badly. The deceased then acknowledged his execution of the release in the presence of Mr. McPherson as a notary public. The plaintiff's daughter, who lived with him and who had for a number of years written his letters for him, and assisted him by her advice in occasional matters of business, was present during his interview with Cameron; she told her father not to sign the release without having the advice of Mr. Mabbee, and she endeavoured to get Cameron to leave the matter open until the next day so that they might think it over and obtain advice, but he said the offer was only open for that day, and that he must leave by the afternoon train.

I think it is plain that the lever used by Cameron to obtain the settlement was an assertion that the reinstatement of the policy had been obtained by a misstatement in one of the answers contained in the application for reinstatement; and that this misstatement rendered the policy void. The reason given by the deceased to Cameron and his daughter for insisting upon signing the release and closing the matter at once, was, that it would be wiser to take the \$500 rather than run the risk of a law suit. The next morning Miss Hamilton, the daughter of the deceased, with her father's consent, went to Mr. Mabbee and consulted him upon the subject. The result was that Mr. Mabbee at once returned the \$500 draft to the defendants, and informed them that the deceased, having been induced to execute the release by misrepresentations as to his position and rights, repudiated it and insisted upon his rights under the policy. Some correspondence took place, during which the deceased died on 19th July, 1902. Proofs of his death were put in, and the plaintiffs demanded payment of the amount of the policy. The defendants insisted that the release was valid and refused to pay the claim. This action having been brought, the defendants denied their liability upon the policy apart entirely from the release, and they also set up the release as a bar. An order was obtained by the defendants for the trial of the issue as to the release before the trial of the other issue, and the issue as to the release was tried before me at Stratford on 22nd September, 1903, without a jury.

The deceased was a retired farmer, and was about 71 years of age at the time he executed the release in question; he was suffering at the time from a disease which he alleged totally disabled him from attending to any business, and he died within three months. If the policy had been validly reinstated in July, 1901, then it would plainly have been unwise for the deceased to accept \$500 in full of his policy at his age and in his state of health. On the other hand, if the

policy had never been validly reinstated, the \$500 paid the deceased was so much clear gain.

The important question for the deceased to determine in deciding upon Cameron's offer, was his real position under the policy. Was it valid or not? Cameron said it was not by reason of a misstatement which had been made in the application for reinstatement. Neither the deceased nor his daughter was competent to determine the question of law involved in this statement, and the daughter wisely asked for time to enable her to obtain advice. Cameron declined to hold the offer open, and the deceased insisted upon executing the release, fearing that otherwise he should get nothing except through the means of a law suit, which he feared to enter upon.

I think the main reason why the deceased accepted the settlement was the positive assertion of Cameron that the policy was already void and that the deceased had no legal claims under it, and that the defendants were only giving him the \$500 because they would rather pay that sum than go to law. The defendants had not written to the deceased before Cameron went to him, and he was entirely taken by surprise; he was effectually prevented from taking legal advice by the refusal of Cameron to leave the matter open until the next day, and he was overborne for the time by the assertion of Cameron that the policy was already void.

The question of the real effect of the misstatement made by the deceased in his application for reinstatement, was not argued before me, and it could not of course be determined upon this issue. It is sufficient to say, however, that it has been pleaded by the defendants in the present action as a defence entirely apart from the release, and that it is by no means clear that it affords a defence to an action on the policy. Cameron asserted absolutely that the policy was void; he and the deceased were not on equal terms; the deceased had no sufficient advice and protection; he was old and infirm, and one of Cameron's objects plainly was to prevent him from having legal advice; as soon as he obtained legal advice, which was the next morning, he repudiated the release and returned the draft.

In my opinion, the release cannot stand, and this issue should be found in favour of the plaintiffs. The costs I leave to be dealt with by the Judge before whom the other issues are tried.

MACMAHON, J.

SEPTEMBER 30TH, 1903.

WEEKLY COURT.

UNIVERSITY OF TRINITY COLLEGE v. MACKLEM.

*Injunction—Interim Order—Absence of Irreparable Injury—
Dissolution—Convenience—University Federation.*

Motion by plaintiffs for an order continuing an interim injunction.

The action was brought in the name of the University of Trinity College, as plaintiffs, along with William Nattress, a graduate, the Rev. Thomas W. Powell, a student, and the Rev. John Langtry, a graduate and a member of Convocation and of the Corporation of Trinity College, suing on behalf of themselves and all other students, graduates, and members of convocation, against the Revd. Thomas Clark Street Macklem, John Austin Worrell, Edward Martin, the Corporation of Trinity College, and the Bishops of Toronto, Huron, Ottawa, Niagara, Algoma, and Ontario, as defendants.

On the 15th September the plaintiffs obtained an ex parte injunction restraining the first three named defendants from presenting to the council or corporation of Trinity College for adoption the report made by them on the project of federation with the University of Toronto, and restraining the defendants the Bishops from sanctioning or permitting or from joining in any negotiations or sanction of federation.

The motion to continue this injunction was heard on the 29th September.

F. Arnoldi, K.C., and E. D. Armour, K.C., for plaintiffs.

C. H. Ritchie, K.C., and J. A. Worrell, K.C., for defendants.

MACMAHON, J.—I think the interim injunction granted by Mr. Justice Ferguson must be dissolved.

I express no opinion as to the merits of the case. But the plaintiffs have not shewn that any irreparable injury, or in fact that any injury whatever, will be suffered by them entitling them to a continuation of the injunction.

Trinity College will be open until the contemplated federation of the college with Toronto University, which cannot take place until 1904, and until then there will be no change whatever in the curriculum.

The plaintiffs will not be affected in any way by any further proceedings taken, or any agreements entered into between Trinity College and the University of Toronto, towards

carrying out the contemplated scheme of federation, if what is contemplated proves to be invalid.

On the other hand, irreparable injury may result to the defendants, should the conditional subscriptions to the extent of \$130,000 made towards the funds of the college, be withdrawn, which would probably be the result should the injunction be continued.

The defendants are to facilitate the plaintiffs in proceeding to trial at the present non-jury sittings, and are to take short notice of trial.

The costs of the injunction motion to be costs in the cause unless the trial Judge otherwise orders.

FALCONBRIDGE, C.J.

SEPTEMBER 30TH, 1903.

WEEKLY COURT.

RE DONALDSON, GIBSON v. DONALDSON.

Executors and Administrators—Charging Administratrix with Loss to Estate—Chattels—Contract for Sale of Land—Statute of Frauds.

Appeal by defendant Henrietta Donaldson, administratrix, from Master's report in an administration matter.

W. H. Blake, K.C., for appellant.

I. F. Hellmuth, K.C., for plaintiff.

FALCONBRIDGE, C.J.—As to the \$25 charged for chattels (complained of in paragraph 10 of the notice of appeal), the Master did not err in charging that amount, the administratrix having sworn that Arthur Traver offered \$25 for the chattels in question.

As to the charge of \$1.025 and interest, on the ground of wilful neglect and default in the sale of the 80 acres to Arthur Traver, the Master's findings of fact are fully borne out by the evidence. Knowledge of what was going on by way of negotiation between Arthur Traver and proposed purchasers from him is traced to the administratrix before she had made any binding contract with him sufficient to have prevented her from carrying out the sale to a youth under 21, of little or no apparent means, and who was her own nephew. An executor is not bound to plead the Statute of Limitations, but no such liberty has been extended with reference to the Statute of Frauds: *Field v. White*, 29 Ch. D. 358.

Appeal dismissed with costs.

CARTWRIGHT, MASTER.

OCTOBER 1ST, 1903.

CHAMBERS.

ONTARIO BANK v. STEWART.

Jury Notice—Motion to Strike Out—Equitable Issues Raised by Defendant.

Motion by plaintiffs to strike out a jury notice. The action was brought to recover \$1,450, the amount of two promissory notes. The defendant counterclaimed to have the notes sued on delivered up and to restrain the plaintiffs from making any use of them. The defendant served the jury notice which plaintiffs moved to strike out for irregularity because the issues to be tried were equitable.

C. A. Moss, for plaintiffs.

Grayson Smith, for defendant.

THE MASTER held that the statement of claim clearly and beyond question raised none but legal issues, and a defendant who raises equitable issues does not thereby debar himself and the plaintiff from giving a jury notice. *Sawyer v. Robertson*, 19 P. R. 172, *Bingham v. Warner*, 10 P. R. 621, *Toogood v. Hindmarsh*, 17 P. R. 451, *McMahon v. Lavery*, 12 P. R. 62, *Temperance Colonization Society v. Evans*, 12 P. R. 48, and *Conmee v. Canadian Pacific R. W. Co.*, 12 A. R. 744, referred to. Motion to strike out jury notice dismissed. Costs in the cause.

FALCONBRIDGE, C.J.

OCTOBER 1ST, 1903.

WEEKLY COURT.

ONTARIO POWER CO v. WHATTTLER.

Partition—Reference—Right to Sale of Whole Property—Partition of Part and Sale of Part.

Appeal by defendants Whattler and Hewson from the report of a local Master. The order of reference authorized a partition of part and sale of the remainder of the lands in question.

C. A. Masten, for appellants.

W. Cassels, K.C., for plaintiffs.

FALCONBRIDGE, C.J.—Defendants may have a sale or partition of the 6 1-2 acres to be vested in them, if they choose. In the absence of evidence to the contrary, the aliquot share of the plaintiffs set apart by the report is manifestly the least

in value (as being farthest from the highway and having no access thereto), excluding the fact that plaintiffs may want that portion for their works. The last mentioned fact does not seem to furnish a sufficient reason for ordering a sale of the whole property. *Hobson v. Sherwood*, 4 Beav. 184, referred to. Appeal dismissed with costs.

CARTWRIGHT, MASTER.

OCTOBER 2ND, 1903

CHAMBERS.

MCDONALD v. PARK.

Venue—Change of—Substantial Grounds—Preponderance of Convenience—Cause of Action—Residence of Parties—Witnesses—Expense—Increased Security for Costs.

Motion by defendants to change the venue from Toronto to Chatham.

The action was brought to set aside a will, dated 27th November, 1902, and establish a prior will of the plaintiff's mother, who died in the city of Chatham on the 16th December, 1902. The plaintiff and one defendant, Frederick McDonald, resided in the State of Wisconsin. The other defendants all resided at Chatham, except one, the plaintiff's father, as to whose place of residence there was a dispute.

W. E. Middleton, for defendants other than George McDonald and infants.

C. A. Moss, for defendant George McDonald.

Casey Wood, for plaintiff.

THE MASTER, after a reference to *Campbell v. Doherty*, 18 P. R. at p. 245, proceeded:—The main object of this action is to set aside the probate of the second will. This must be done and finally determined before any attempt to establish the earlier will: see R. S. O. 1897 ch. 59, sec. 21.

It would seem reasonably certain that most, if not all, of the material facts bearing on this first question will be proved, if capable of proof, by the evidence of witnesses in Chatham or the neighbourhood, such as the 5 or 6 persons who were in attendance on the testatrix on 27th November, 1902, and present at the execution of her will made on that day.

The defendant Mrs. Park states in her depositions that, besides these, there are many other persons to be called for the defence who are residents of Chatham, and states the class of evidence they are expected to give. The plaintiff's

affidavit is silent on this point. [Reference to *Burke v. McInerney*, 38 C. L. J. 444, as referred to in article by Mr. Alexander MacGregor.]

The onus is on the plaintiff to set aside the letters probate of the second will. To do this, he must, one would imagine, have to call a considerable number of witnesses, in view of the statements in Mrs. Park's depositions; and by the very nature of the case these persons must be residents of Chatham. . . .

The present case is not within the letter of Rule 529 (b). Yet I think that this provision may properly be applied to a case that comes within its spirit. [Reference to *Edsall v. Wray*, 19 P. R. 245; *Bertram v. Pursley*, ante 264.]

The whole cause of action arose in Chatham. By the necessity of the case nearly all the material witnesses on both sides will be found there. It is in Chatham that most of the parties reside. The plaintiff and the defendant Frederick McDonald must pass through or by Chatham to reach Toronto, and the father is as near to Chatham, if not actually resident there, as he is to Toronto. Toronto is 179 miles distant from Chatham. The return fare is \$8.85. So that a considerable sum would be required to bring even 12 witnesses from Chatham to Toronto and keep them here for two or three days. . . . To bring any considerable number here would require at least \$200. . . . The trial is likely to be lengthy.

Another ground for the change is that of general convenience. If this action had originated in the usual way, it would have begun in the Surrogate Court at Chatham. Even if removed into the High Court, it would have been tried there. And it is there that all necessary and material evidence, whether oral or documentary, would be sought in the first instance. . . . I think that "substantial grounds" have been shewn to justify the change as being in the interests of all parties, whether litigants or witnesses. A trial at Chatham will be a great saving to all concerned, and at the same time it will facilitate a determination of the issue involved according to the very right and justice of the case, by making it easier to have all material evidence available at the trial with the least possible expense to all parties, and the least possible inconvenience to the witnesses.

The order will go as asked. Costs in the cause.

I think it well to add that plaintiff has given security for costs. If the venue were to remain in Toronto, it would be a question for the parties to consider whether additional security might not properly be ordered, for the reasons given

in *Burnside v. Eaton*, ante 412, and *Dever v. Fairweather*, ante 389, and cases there cited. But, if the venue is changed to Chatham, there will be much less ground for such an application.

STREET, J.

OCTOBER 3RD, 1903.

TRIAL.

DALTON v. WILLIAMS..

Will—Construction—Effect of Codicil—Effect of Decrees in Former Suit—Annuities—Setting apart whole Estate to Answer—Gift over—Practical Revocation of Legacies—Payment of Arrears of Annuities—Interest—Reference—Costs.

Action by the present trustees under the will of Sophia Dalton, deceased, for the construction of her will dated 4th May, 1854, and a codicil to it dated in April, 1856. The testatrix died on the 14th June, 1859.

The will was as follows:—

“I wish all the property which I shall own at the time of my death to be converted into money at the discretion of my executors. . . . I hereby give, devise, and bequeath everything real and personal which I shall have at my death to my said executors and their heirs as joint tenants, and I desire them to pay thereout the following legacies: to my daughter Harriet, £500; to my daughter Mary, £500; to my son William, £400; to my son Robert, £400; to Henry Dalton . . . £200; to my son Thomas, £50; to my daughter Emma, £150; to my son William . . . £100 as trustee for his son Thomas. . . . And I give to my son Robert Gladstone Dalton £250 in order that he may invest it for the benefit of his sister Sophia for her separate use independent of and free from the control of her husband . . . during her lifetime, and at her death I desire the capital to go as she may by will . . . direct. And I give the further sum of £200 to my son Robert Gladstone Dalton in order that he may invest it for the benefit of Harriet Dalton, the wife of my son Thomas Dalton, for her separate use . . . that Robert may pay her the income therefrom . . . during her life, and at her death the capital shall go as she shall by her will . . . direct. And I direct that my executors shall invest the further sum of £1,000 for the benefit of my daughters Harriet and Mary equally, for their separate use, free from the control of their husbands should they marry, as follows: I desire it to be so invested as to produce an income which shall be paid equally to each of them

for her separate use, free from the control of her husband should she marry, during their respective lives. And upon the death of either of them her share shall go to her children equally if she shall marry and leave children, and if at her death she shall not leave any child then the capital shall be equally divided among her brothers and sisters or their children. If my property shall not prove sufficient to pay all the above sums, then the legacies to my daughters Mary and Harriet and the £1,000 above directed to be invested for their benefit shall be first paid in full, and all the other legacies shall then be paid ratably. If there shall be a surplus of property after providing for all the above sums, then such surplus shall be equally divided among my children Sophia, William, Robert, Emma, Harriet, and Mary equally. My desire is that the trustees above named shall not in any case be answerable for the failure of any fund in which the moneys may be invested by them, or for any loss whatever which shall not arise from their wilful and wrongful act or default. . . .”

The codicil was as follows:

“It is my intention to build upon the two acres held in trust by Robert for myself for life and for my daughters Harriet and Mary in fee after my death, and in case of my death before the completion of the house, I desire that it may be completed and furnished. . . . And I wish that after my death my executors shall invest enough of my property for Harriet and Mary to make an income of £100 a year to each of them during their lives. Should either of them die without issue before the other, the survivor is then to have the whole income or £200 a year. In case of the death of either of them leaving issue, they are to have the power of leaving by will, whether their husbands be alive or not; upon their death without issue, or without a will if they have issue, the property out of which the income is derived shall go to their brothers and sisters or their issue. This is meant instead of all that is in my said daughters’ favour in my will, and is a revocation thereof. My son William I wish to have £500, to be paid to him by my executors. What is here is to stand prior to everything in my said will.”

On 1st February, 1875, the executors named in the will filed a bill in chancery and asked for an interpretation of the will and a declaration of the rights of the persons interested in the estate. The bill set forth that the estate had come to their hands consisting for the most part of unproductive lots in Toronto, which they had been unable to sell until shortly before the filing of the bill; that they had been unable to pay the annuities to Harriet and Mary under the

codicil in full, and that they were largely in arrear; that they had paid a part of the legacy to William, and that the rest was unpaid. A decree was pronounced in this suit on 16th June, 1875, the material portions of which, for the purpose of the present action, were, 1st, a declaration that the legacy of £500 to William contained in the codicil, and the sum necessary to be set apart to provide for the payment of the annuities to Mary and Harriet, were of equal priority, and should abate proportionately in the event of a deficiency of assets; that in the event of a deficiency the said legacy and annuities were to be the first charges on the corpus of the estate, real and personal, the said William Dalton being entitled to \$2,000 and interest from a year after the death of the testatrix, less any payment to which had been made on account; and the said Mary and Harriet to the annual sum of \$400 each, and the survivor of them to the annual sum of \$800, payable during their lives and the life of the survivor, without interest, and that they are entitled as against all the legatees other than the said William to receive the income of the said estate for the satisfaction of the said legacies and the arrears thereof remaining unpaid, to be settled by the Master, without interest, but the said Mary and Harriet are not entitled to be paid the amount of the said annuities or the arrears thereof out of the corpus of the said estate, but only to the extent of the income derived therefrom.

There was a reference to the Master to take the necessary accounts for determining and working out the rights of the parties touching the matters in question as declared in the decree, and further directions were reserved.

At the time this decree was pronounced the sales of land had amounted in all to \$13,425.89; the greater part of the remainder of the land was not sold until after 1st July, 1882. When the estate was finally disposed of, it left a capital sum of about \$28,000, consisting of mortgages and securities on hand. The annuitant Mary Dalton became Mary McMichael, and died on 12th February, 1880, without issue; the annuitant Harriet Dalton never married, and died 27th July, 1902. No report was made under the decree of 16th June, 1875, until 28th October, 1889. By the report then made it was found that the capital of the estate was \$28,100.27; that all the lands and personalty had been realized and the debts paid; that at the death of Mary McMichael her annuity was in arrear \$4,889.57, and that at 1st June, 1889, the annuity payable to Harriet Dalton was in arrear \$5,008.49, and that the legacy to William had been paid in full, and that none of the other legacies had been paid. A decree on further directions was made on 22nd September, 1890, by which it

was declared that the executors were to be at liberty to apply the whole estate from time to time in payment of the annuity of \$800 to Harriet Dalton and in or towards satisfaction of the whole of the arrears of the annuities to her and Mary McMichael, deceased, before distributing any part of the corpus of the estate to or among residuary legatees. Since the making of the decree on further directions the trustees have applied the whole income of the estate in payment of the annuity of \$800 to Harriet Dalton until her death, and in payment of the arrears due to her and to the estate of Mary McMichael, deceased, and at the present time the arrears unpaid are as follows:—To the estate of Harriet Dalton, \$2,457.16; to the estate of Mary McMichael, \$1,043.61.

The present action is brought to determine the rights of all parties to the trust fund, which is said to amount to \$25,730, of which the greater part is upon mortgage security, the remainder being represented by houses which have fallen into the hands of the trustees for unpaid mortgage moneys.

The action was tried before Street, J., without a jury, on the 28th September, 1903.

D. T. Symons, for plaintiffs.

R. C. Clute, K.C., for defendant Edith J. Williams.

A. H. Marsh, K.C., and H. G. Kingstone, for representatives of annuitants.

H. Cassels, K.C., for those claiming as residuary legatees under codicil other than Emma Wilson.

R. S. Cassels, for those claiming as residuary legatees under codicil and as legatees under will other than Emma Wilson.

W. D. Gwynne, for Edward H. Dalton, claiming as residuary devisee under a codicil.

Shirley Denison, for defendant Emma Wilson, the sole surviving beneficiary.

STREET, J., held that the effect of the decrees in the former suit in Chancery was to set apart the whole estate as the fund to secure the payment of the annuities to the daughters of the testatrix, Mary McMichael and Harriet Dalton. The effect of these decrees and the action taken by the trustees in obedience to them must stand, and the necessary result is to make the whole estate pass under the codicil and to leave nothing for the will to take effect upon. The effect of the codicil, in the event which has happened, of both daughters having died without issue, is that the gift over takes effect,

and the whole corpus of the fund passes to the brothers and sisters of the survivor living at her death, and to the issue per stirpes of any brother or sister who may have died before that date and subsequent to the death of the testatrix, leaving issue. The issue of a deceased brother or sister take by way of substitution the share their father or mother would have taken if living. The gift over is subject, however, to a question as to the payment of the balance of the arrears of the annuity. Held, as to this, that the representatives of the annuitants are entitled to be paid the arrears of their respective annuities out of the fund composed of corpus and accrued income, and the balance of the fund is to be distributed amongst the brothers and sisters or their issue, as above. The representatives of the annuitants are not entitled to interest. Plaintiffs are entitled to a reference to the Master to pass their accounts and fix their remuneration. Costs of all parties of originating notice (served before this action was begun) and of this action to the hearing to be paid out of the estate, those of plaintiffs to be taxed as between solicitor and client. Costs in the Master's office of all parties to be limited to \$100, besides disbursements, and to be distributed like commission.

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STREET, J.

OCTOBER 5TH, 1903.

CHAMBERS.

ONTARIO BANK v. STEWART.

*Jury Notice—Motion to Strike out—Equitable Issues Raised
by Defendant.*

Appeal by plaintiffs from order of Master in Chambers, ante 811, refusing to strike out jury notice for irregularity, and motion by plaintiffs to strike out the jury notice as a matter of discretion.

C. A. Moss, for plaintiffs.

Grayson Smith, for defendant.

STREET, J., dismissed the appeal and motion, and directed that plaintiffs should go down to trial at Brampton and pay the extra expense.

MACMAHON, J.

OCTOBER 5TH, 1903.

WEEKLY COURT.

METALLIC ROOFING CO. OF CANADA v. LOCAL
UNION No. 30, AMALGAMATED SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION.

*Parties—Representation of Classes—Rule 200—Members of
Unincorporated Association — Trades Unions — Local
Union—Officers.*

Motion by plaintiffs for an order that the individual defendants shall, for the purposes of this action, represent and be authorized to defend this action on behalf of and for the benefit of all other persons constituting the local union and the association, and that all such other persons shall be bound by the judgment and the proceedings herein.

The local union was not an incorporated company or partnership, but was an association bound together for the mutual benefit of its members. The individual members of the local union who were made defendants and served with process were: William Jose, who at the commencement of the action was president; Richard Russell, treasurer; S. Cox, financial secretary; W. C. Brake, recording secretary; J. S. Chapman, corresponding secretary; J. H. Kennedy, the person appointed president in place of Jose, and also first vice-president of the association; and J. S. Annable and James Gow, members of a committee appointed by the local union. The local union held its charter from the association, which had its head office in Kansas City, in the United States.

W. N. Tilley, for plaintiffs.

J. G. O'Donoghue, for individual defendants.

MACMAHON, J., held, following *Small v. Hyttenrauch*, 2 O. W. R. 658, that the individual defendants were properly qualified to represent the other members of the local union, under Rule 200. That Rule gives no power to order that the officers of the local union shall represent the other persons constituting the association, which is a foreign body, having its headquarters in Kansas, and under whose jurisdiction the whole of the local unions in the United States and Canada are placed. Order made that the individual defendants shall represent the other members of the local union. Costs in the cause.

STREET, J.

OCTOBER 5TH, 1903.

TRIAL.

EQUITY FIRE INS. CO. v. MERCHANTS FIRE INS. CO.

*Insurance—Fire—Reinsurance — Condition — Warranty—
Breach—Change Material to Risk.*

On 30th January, 1901, plaintiffs, by their policy No. 7927, insured the Duncan Lithographic Co. of Hamilton against loss by fire to the extent of \$6,000 for one year, divided up as follows: \$1,666.65 upon machinery and tools; \$2,511.20 upon plates and stones; \$1,544.35 upon stock of stationery, colours, etc.; \$277.80 on office fixtures, etc. On the same day plaintiffs reinsured the risk with defendants to the extent of \$1,000. Attached to the policy of reinsurance was a printed slip, part of which was as follows: "It is warranted by the Equity Fire Insurance Company that it will retain an amount at risk fully equal to that reinsured under this policy." The policy was declared on its face to be subject to the conditions indorsed on it, and they were declared

to be the basis of the contract. Indorsed upon the policy were the usual statutory conditions and some additional conditions printed in red ink, one of which declared that any warranty contained in any slip attached to the policy should be as binding on the assured as if it had been printed on the policy as one of the conditions thereof. Plaintiffs effected other policies of reinsurance of the risk under policy No. 7927 with other companies to the full amount of \$6,000. Later the plaintiffs issued another policy, No. 8202, assuring the same lithographing company against loss by fire to the extent of \$2,000 upon the machinery and tools mentioned in their policy No. 7927, but not covering the other property insured under that policy, and afterwards plaintiffs reinsured this latter risk to the extent of \$500 with the York Fire Insurance Company. The property insured under these policies was destroyed by fire in December, 1901, and plaintiffs, having paid the loss, brought the present action to recover from defendants their proportion of the loss upon the reinsurance policy.

G. H. Watson, K.C., for plaintiffs.

R. C. Levesconte and W. J. O'Neil, for defendants.

STREET, J.—The proper interpretation to be placed upon the warranty is, that plaintiffs would not reinsure more than \$5,000 of the \$6,000 which they had "at risk," as recited in the slip, and therefore the warranty was broken as soon as they effected reinsurances to the full amount of the policy. The warranty would still have been broken even had the \$2,000 policy covered the same property as that insured by the \$6,000 one. In any event the warranty was broken, even if the \$2,000 policy could be taken into account, because it covered only a portion of the property comprised in the \$6,000 policy, and the risk was, therefore, not identical. Plaintiffs, having broken the condition, are disentitled to recover. The condition was a reasonable and a material one, and the breach of it by plaintiffs was a change material to the risk assumed by defendants. Action dismissed with costs.

STREET, J.

OCTOBER 5TH, 1903.

TRIAL.

McNAB v. FORREST.

Vendor and Purchaser—Written Contract for Sale of Land—Enforcement by Vendor—Parol Variation of Contract—Specific Performance—Description of Land—Statute of Frauds.

Action for specific performance of a contract in writing by which defendants agreed to purchase from plaintiff land

in the city of Stratford described by metes and bounds. Plaintiff was in the service of the Grand Trunk Railway Company at Stratford, and defendants were two sisters, dress-makers, carrying on business there. Defendants had been to see the property in question, which was occupied by plaintiff and his wife. The price asked was \$1,600. Defendants were told that plaintiff would reserve the rear ten feet of the lot for a right of way to another part of the same lot. After this defendants went to the house in the evening, when plaintiff was at home, and his son-in-law, a solicitor, was present. Plaintiff said his price was \$1,600, but that he would allow defendants \$25 off for the ten feet. Defendants said that \$25 was not enough. Plaintiff said he would not fence off the ten feet so long as defendants would give him another right of way, which was then actually used, across the parcel defendants were negotiating for—that they might use the buildings upon the ten feet as long as he had the use of the other right of way. The solicitor had drawn up an agreement for the sale of the land, excepting the ten feet, for \$1,600, and containing no provision entitling defendants to use the ten feet at all. This agreement was read over to defendants carefully that evening, and was signed by defendants on a subsequent day. Defendants refused to perform it. Plaintiff tendered them a conveyance of the property, deducting the ten feet, the price mentioned being \$1,600, but at the time of tendering it informed defendants that he was willing to accept \$1,575 in full. Defendants asked reformation of the contract.

J. P. Mabee, K.C., for plaintiff.

G. G. McPherson, K.C., for defendants.

STREET, J.—The defendants, by executing the agreement in question, must be taken to have done so understanding that they were accepting the offer made to them by plaintiff, viz., that he should allow them \$25 off the purchase money in consideration of the reservation of ten feet, and that the ten feet should not be fenced off nor interfered with in any way by plaintiff, so long as defendants were willing to allow him a right of way across the premises they were buying, and that defendants should be at liberty during that period to use the outbuildings upon the ten feet, but that defendants might at any time put an end to the right of way over their land, and that upon their doing so plaintiff should thenceforward have an exclusive right to the ten feet. . . . If plaintiff is willing to accept judgment for specific performance of the agreement with this variation, judgment will go

accordingly, but without costs, because he has asked for performance of the agreement as drawn, and he is not entitled to that relief. Should he refuse to take this judgment, the action will be dismissed with costs. The land is sufficiently identified by the description in the agreement to satisfy the Statute of Frauds; it is clear that it fits the lot owned by plaintiff, and it has not been shewn that it would in all respects fit any other lot.

OCTOBER 5TH, 1903.

DIVISIONAL COURT.

RE GLANVILLE v. DOYLE FISH CO.

Prohibition—Division Court—Territorial Jurisdiction—Cause of Action, where Arising—Contract by Telegraph.

Appeal by plaintiffs from order of FERGUSON, J., in Chambers, ante 616, for prohibition to the 3rd Division Court in the district of Algoma.

Grayson Smith, for appellants.

Gideon Grant, for defendants.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), dismissed the appeal with costs.

OCTOBER 5TH, 1903.

DIVISIONAL COURT.

FARMERS' LOAN AND SAVINGS CO. v. MUNNS.

Summary Judgment—Rule 603—Implied Covenant for Payment—Leave to Defend—Terms.

Appeal by defendant from order of STREET, J., ante 503, reversing order of Master in Chambers (ib.) which dismissed a motion for summary judgment under Rule 603, and allowing plaintiffs to enter judgment.

Gideon Grant, for appellant.

W. M. Douglas, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) made an order that upon the filing by the defendant of a further affidavit, and upon payment of the costs imposed by the order appealed against and the costs of this appeal, the order and judgment be rescinded; the plaintiffs' claim as indorsed on the writ of summons to stand as a statement

of claim; the defendant to file his defence at once and to accept short notice of trial, and the action to be entered for trial and the case put upon the peremptory list, notwithstanding that the time limited by the Rules may not have expired; the plaintiffs' writ of fi. fa. to stand as security for their debt.

OCTOBER 5TH, 1903.

DIVISIONAL COURT.

BUCKINDALE v. ROACH.

Security for Costs—Costs of Former Action Unpaid—Instructions Given by Same Plaintiff—Action Brought in Name of Wrong Person.

Appeal by plaintiff from order of FALCONBRIDGE, C.J., ante 788, dismissing plaintiff's appeal from order of Master in Chambers, ante 775, requiring plaintiff to give security for costs, on the ground that the costs of a former action were unpaid. The former action was apparently for the same cause, but was brought, by the mistake of the solicitor, in the name of the plaintiff's father, instead of in the name of the plaintiff, although the instructions were given by plaintiff. The former action came down to trial and was dismissed because the plaintiff therein had no cause of action.

S. B. Woods, for plaintiff.

J. W. McCullough, for defendant.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that defendant was not entitled to security for costs, and allowed the appeal with costs here and below.

CARTWRIGHT, MASTER.

OCTOBER 6TH, 1903.

CHAMBERS.

PASK v. KINSELLA.

Parties—Joinder of Plaintiffs—Distinct Causes of Action—Husband and Wife—Wages of Wife—Money Expended by Husband.

Motion by defendant for an order requiring plaintiffs to elect which claim is to be proceeded with in this action and to make all amendments necessary thereafter.

The statement of claim set out that the plaintiffs, George and Mary Pask, were married in July, 1901, Mary being the daughter of the defendant; that from July, 1896, until her

marriage, Mary Pask, at the request of the defendant, acted as his housekeeper, on the representation that he would devise to her certain real estate, and that consequently she received no wages; that after their marriage the plaintiffs, at the request of the defendant, continued to live with him on the property mentioned until dispossessed by him in August, 1903, and during that time defendant paid nothing for his board; and that George Pask, at the request of the defendant and with his consent, and on the distinct understanding that the property belonged to the plaintiff Mary Pask, expended in repairs to the defendant's house \$771.72.

The prayer for relief was by the plaintiffs jointly for \$1,575.72, made up as follows: \$600 for wages due Mary Pask, \$204 for board of defendant for 17 months, and \$771.72 for repairs.

J. M. Ferguson (Denton, Dunn, and Boulthbee), for defendant.

G. H. Kilmer, for plaintiffs.

THE MASTER.—The claim for wages due Mary Pask before marriage, and the claim of the husband for repairs, are plainly two distinct causes of action vested in different plaintiffs. There is no allegation in the statement of claim as to the charge for defendant's board amounting to \$204, shewing which of the plaintiffs makes this claim, or whether it is joint.

The terms of Rule 185 are in themselves plain. They have been interpreted by the Courts in England in *Stroud v. Lawson*, [1898] 2 Q. B. 44; *Universities v. Gill*, [1899] 1 Ch. 55; *Waller v. Green*, [1899] 2 Ch. 696; *Ellis v. Duke of Bedford*, [1899] 1 Ch. 494, [1901] A. C. 1. See *Odgers on Pleading*, 5th ed., pp. 25, 26.

The Rule is said by Stirling, J., in the second case, p. 60, to be as laid down by Chitty, L.J., in *Stroud v. Lawson* (p. 52), "that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of law or fact in order that the case may be within the rule." And in that case Vaughan Williams, L.J., says (at p. 54): "The two conditions (above mentioned) are *not* alternative."

Applying this principle, it seems clear that the claims of Mary Pask for wages and of her husband for repairs, assuming them to be maintainable, cannot properly be joined in the same action. What common question of law or fact has to be determined for the success of these two claims? If the plaintiffs had brought separate actions, could the defendant

have successfully asked for consolidation? The only possible suggestion of a common question of fact is the alleged promise of the defendant to leave the property to his daughter. But does this satisfy the rule? Are the claims really connected otherwise than "historically," as is said in one of the cases? If entitled to wages, the daughter need not, perhaps cannot, rely on the alleged promise as a ground for recovery. It would only be a reason for not having made her claim earlier. So, too, her husband. His claim must be based on the request and consent of the defendant (as set out in para. 6 of the statement of claim). And the alleged promise again is an explanation of the delay in making the present claim, but cannot be put forward as the ground for making it.

There are few cases in our own Courts on this Rule. I notice in *Liddiard v. Toronto R. W. Co.*, 2 O. W. R. 145, none are cited by Mr. Winchester. The only one I have seen on the Rule itself is *Dixon v. Tracey*, 17 C. L. T. Occ. N. 381, where Meredith, J., held that father and daughter could not join as plaintiffs seeking to recover \$1,000 on behalf of both plaintiffs for seduction of the daughter and breach of promise.

So far I have not said anything about the \$204 claimed for board of defendant after the marriage of the plaintiffs in July, 1901. It should be made clear whether the plaintiffs are suing for this jointly, or if not, by which of them it is claimed. . . .

The order will go that plaintiffs do elect within two weeks which plaintiff's claim will be proceeded with in this action, and do within the same time amend the statement of claim by striking out all parts that refer to the claim of the other plaintiff, and that in default the action be dismissed with costs.

The costs of this motion to be in the cause to defendant.

The plaintiff continuing will be at liberty to join the claim for \$204 for board of defendant, if so advised, either as a separate or joint claim.

MACMAHON, J.

OCTOBER 6TH, 1903.

CHAMBERS.

RE DOMINION OIL CO.

Company—Shares—Transfer—Refusal to Register—Mandamus.

Application by W. B. Whelpley, the holder of a certificate for 50,000 shares of the company, issued under the seal of

the company to the Colonial Securities Company on the 21st March, 1903, and assigned by that company to the applicant on the 20th July, for a mandatory order requiring the secretary of the oil company to transfer the stock on the books of the company to the name of the applicant, and to issue a share certificate therefor. The ground of refusal by the secretary of the oil company to enter the transfer on the books of the company was that the Colonial Securities Company had broken a contract with the oil company, and in consequence the latter had passed a resolution not to put through any more transfers of stock made by the securities company until they had fulfilled their contract. The applicant (who resided in New York) in his affidavit stated that he purchased the 50,000 shares of stock in good faith in the usual way of business from the Colonial Securities Company, to whom he paid a valuable consideration.

C. A Moss, for the applicant.

W. E. Middleton, for the company.

MACMAHON, J., held that the applicant, having purchased in good faith and without notice of any infirmity in the title of his vendors, was entitled to a mandatory order as asked, with costs.

CARTWRIGHT, MASTER.

OCTOBER 7TH, 1903.

CHAMBERS.

ATKINSON v. PLIMPTON.

Writ of Summons—Service out of Jurisdiction—Order Permitting — Motion to Set aside — Action for Price of Goods Sold—Sale by Sample—Return of Goods—Copyright—Discretion as to Forum.

Motion by defendants to set aside an order allowing plaintiffs to issue a writ of summons for service on defendants at Liverpool, England, the writ issued pursuant thereto, the service thereof, and all subsequent proceedings.

The action was to recover \$2,200, a balance alleged to be due for goods sold and delivered to defendants.

In the spring of 1902 defendant Kirkness was in Toronto, and saw plaintiffs, who were a firm of wholesale dealers in fancy goods. At this interview it was agreed that plaintiffs should send to defendants, who were a firm doing business at Liverpool, samples of their goods. This was done, and after inspection orders were sent by defendants, pursuant to which goods were shipped by plaintiffs. Defendants returned

a part of the goods and refused to pay for them, and this action was brought for the price.

J. T. Small, for defendants.

W. E. Middleton, for plaintiffs.

THE MASTER.—I entirely accede to what was urged by Mr. Small as to the duty of full disclosure of all material facts on applications under Rule 162. [*Collins v. North British Co.*, [1894] 3 Ch. 228, *Republic of Peru v. Dreyfus*, 55 L. T. 802, 803, and *In re Burland*, 41 Ch. D. at p. 545, referred to.] . . . I do not see that there was anything here to be complained of. The plaintiffs' affidavit alleged a claim for goods sold and delivered. The fact that the defendants had thought fit to refuse acceptance and had returned them was not a necessary fact to be mentioned. Whether defendants could justify their conduct is the matter to be determined at the trial.

At present the only substantial question is whether . . . an action will lie for goods sold and delivered. And, in my opinion, it will . . .

The orders of defendants to plaintiffs which are in evidence on the motion both bear on their face these words: "Shipment to Liverpool," "Via Leyland line steamer from Boston," "Delivered f.o.b. vessel." The shipping bills are to the same effect. There is no evidence as to whether the goods were insured, or, if so, by whom, in whose name, and for whose benefit.

[*Atkinson v. Bell*, 8 B. & C. 277, *Scott v. Melady*, 27 A. R. 193, *Fragano v. Long*, 4 B. & C. 219, *Wait v. Baker*, 12 Ex. 1, and *In re Wiltshire Iron Co.*, Ex p. *Pearson*, L. R. 3 Ch. 443, *Benjamin on Sales*, 7th Am. ed., p. 348, and *Blackburn on Sales*, 2nd ed., p. 130-2, referred to.]

The facts of the present case seem clearly to resemble those of *Fragano v. Long*. . . . I cannot see how it can be seriously disputed that the goods became the property of defendants once they reached Boston: see *Benjamin*, p. 701. There is no pretence that the goods were not up to sample or as represented by plaintiffs. Indeed, defendant *Kirkness* . . . was in Toronto in the spring. Plaintiffs had, as requested, sent on samples, and afterwards defendants' order was filled and sent forward and only returned on account of the litigation in England about the copyright. These facts seem to distinguish the case from *Bannerman v. White*, 10 C. B. N. S. 844, and *Varley v. Whipp*, [1900] 1 Q. B. 513.

The defendants argue that this is not a case which the Court should in its discretion allow to be tried in Ontario, alleging that the facts to be tried and the principal witnesses are in England, and citing *Lopes v. Chavarri*, [1901] W. N. 115.

[*Postlethwaite v. McWhinney*, ante 794, and cases cited at p. 796, referred to.] . . .

In a case in which the facts were similar to those in *Lopes v. Chavarri*, it would be a most proper, if not a necessary, exercise of discretion to remit the parties to the forum of defendants, being also the forum domicilii of both parties. But here there are no such facts as were before Mr. Justice Farwell, and I think the observations of Halsbury, L.C., in *Cunber v. Leyland*, [1898] A. C. 527, may properly be invoked by the plaintiffs. . . . In the present case payment was admittedly to be made, as it was partly made, in this country, and not elsewhere.

The only substantial defence here is the English law of copyright. Assuming that this can be successfully set up here, I do not think it is a ground for requiring plaintiffs to prosecute their claim in England, where the expense will be very much greater and where they would have to give security for costs.

Motion dismissed with costs to plaintiffs in any event.

CARTWRIGHT, MASTER.

OCTOBER 7TH, 1903.

CHAMBERS.

FULLER v. APPLETON.

Pleading—Counterclaim—Motion to Compel Amendment—Particulars.

Motion by plaintiff for order requiring defendants to amend paragraph 2 of their counterclaim.

The plaintiff's claim was for return of a deposit paid on an option on mining lands. The paragraph of the counterclaim was said to be defective because it alleged only that the plaintiff "has failed to pay to the miners and workmen employed by him their wages, amounting to about \$1,000, and mechanics' liens were filed by such miners and workmen against the property, and the plaintiff has also incurred considerable indebtedness for materials and supplies, a considerable portion of the accounts for which he has neglected and refused to pay."

J. B. O'Brian, for plaintiff, contended that some allegation should be made such as that the land had become liable by reason of the acts of the plaintiff, and that the defendants

as owners would have to pay them, or else that, even if not bound to pay them, they would incur expense in having them removed from the registry office.

Casey Wood, for defendants, contended that the paragraph sufficiently alleged the facts relied on by the defendants as shewing that plaintiff had created clouds on defendants' title, and that other liens might yet be registered; that the plaintiff, having the facts clearly set out, could reply either denying the fact of the existence of the liens, or denying that, if created, under the facts of the case there was liability on defendants' part to pay them.

THE MASTER.—I do not think there is any necessity for amendment. I am not satisfied that without particulars the plaintiff cannot tell what is going to be set up against him at the trial. Unless there are substantial grounds of this character, there is no necessity for amendment of pleadings or for particulars.

So long as a litigant conforms to the spirit of the Rules, he is not to be dictated to as to how he shall frame his pleadings, as was said by Bowen. L.J.

The motion must be dismissed with costs to the defendants in any event.

STREET, J.

OCTOBER 8TH, 1903.

WEEKLY COURT.

RE SYDENHAM SCHOOL SECTION No. 5.

Public Schools—Formation of New Section—Petition—Refusal by Township Council—Appeal—Reference to Arbitration—Award—Exceeding Scope of Reference—Invalidity—By-law—Description—Uncertainty.

Application by the board of trustees of school section No. 5 of the township of Sydenham to set aside an award of arbitrators appointed by by-law No. 638 of the county council of Grey.

On 10th December, 1902, the county council by their by-law No. 623, reciting the reasons therefor and the consent of the corporation of the town of Owen Sound, detached a large tract of land from the town of Owen Sound and attached it to the township of Sydenham. The whole area of Sydenham theretofore existing had been divided into certain school sections.

On 5th May, 1903, the township council refused a petition of a large number of ratepayers for the erection of a new

school section, to be composed of certain of the lots then lately attached to Sydenham along with certain other lots in that township, which had hitherto belonged to the existing school sections Nos. 1, 5, and 12.

On 18th May, 1903, the petitioners appealed to the county council, reciting the refusal of the township council to grant the prayer of their petition, and asking the county council to pass a by-law appointing arbitrators "to consider and adjudicate upon the whole question of the altering of the existing boundary lines of the aforesaid school sections Nos. 1, 5, and 12, and also of the allotting of the territory detached from the town of Owen Sound aforesaid to the proposed new public school section, and the residue of said territory to any of the existing school sections, as said arbitrators may in their wisdom adjudge."

On 19th June, 1903, the county council passed their by-law No. 638, reciting that a large number of ratepayers interested had appealed to the county council against the refusal of the township council to pass a by-law forming a new school section out of parts of school sections 1, 5, and 12, along with parts of the territory recently transferred from Owen Sound and attached to Sydenham, and had asked the county council to appoint arbitrators under the Public Schools Act to consider and determine the matters complained of, and that it appeared right and proper to appoint such arbitrators. The by-law then proceeded to appoint arbitrators "to consider and determine all matters in connexion with the re-arrangement and alteration of the boundaries of said above referred to school sections, or the erection of a new school section, if deemed advisable to do so; and to do all other acts necessary in such case as may be deemed requisite and in accordance with the provisions of the Public Schools Act, and to make their award in this matter."

The arbitrators, on 15th August, 1903, made their award "that there be formed in and for the said township a new school section to be named and numbered school section number 16, the same to be composed of"—here followed a list of lots which included certain lots not mentioned or referred to in the petition to the township council, and omitted certain lots mentioned in that petition. One of the lots mentioned in the award formed part of school section 13, and another formed part of section 2.

N. W. Rowell, K.C., for applicants.

H. G. Tucker, Owen Sound, for petitioners.

STREET, J. . . . The county council had no power to authorize the arbitrators to do more than to sit in appeal from the refusal of the township council to grant the prayer of the petition, and either to allow or disallow what the petitioners asked for, and the arbitrators had no power to do more than that. . . . The award is not the determination of an appeal from the township council, but the promulgation of the views of the arbitrators as to the proper boundaries of a new section which they had no authority to create. . . . Re Southwold School Sections, 3 O. L. R. 81, followed.

The power of a township council to deal with portions of the township which have never been attached to any school section seems to be conferred by sec. 12 of the Act; the power to readjust existing boundaries is dealt with by sec. 41. The Sydenham council passed a by-law, No. 10, on 26th May, 1903, pending the appeal to the county council, distributing their new territory amongst certain existing school sections. There is doubt as to the validity of this by-law, but it is not necessary to pronounce upon the question. The by-law is defective in not fully describing certain "parts" of lots mentioned in it, leaving an uncertainty as to what "parts" are intended.

Order made setting aside the award with costs to be paid by the petitioners represented by counsel opposing the motion.

STREET, J.

OCTOBER 8TH, 1903.

TRIAL.

FALVEY v. FALVEY.

Husband and wife — Alimony — Justification of Wife for Leaving Husband — Violence — Adultery — Misconduct of Wife.

Action for alimony, tried at Toronto.

J. M. Godfrey, for plaintiff.

L. V. McBrady, K.C., for defendant.

STREET, J.—If plaintiff had brought her action for alimony as soon as she left defendant, there would have been no sufficient answer to her claim, because the defendant had been guilty of violence in choking her upon the night before she left him, and this violence was the immediate cause of her leaving him, coupled as it was with the suspicion that he was carrying on improper relations with another woman. It is

true that her own conduct at this time was not irreproachable. Her temper was violent, and she was out a great deal at night, refusing to give her husband any account of her proceedings, and denying in violent language his right to know where she had been. After she left him he assaulted her at the boarding house to which she had gone because she had taken his money when she left him. After this, and while living apart from him, she accepted presents of a watch, a ring, a trunk, underclothing, and money, from a man named Sutherland. These are circumstances leading to strong suspicion of impropriety, but not absolute proof of guilt, in the face of plaintiff's denial. It must be taken to be proved against defendant that he lived in adultery in Toronto for a month with a certain woman, his intimacy with whom in Montreal was one of the causes of his wife's leaving him. The plaintiff was justified in leaving defendant when she did, and defendant by his adultery has deprived himself of the right to say that he is willing to take her back.

Judgment for plaintiff for \$12 a month alimony with costs.

CARTWRIGHT, MASTER.

OCTOBER 10TH, 1903.

CHAMBERS.

CONNER v. DEMPSTER.

*Venue—Rule 529 (b)—Cause of Action, where Arising—
Declaration of Right of Way—Execution of Deed.*

Motion by defendant to change venue from Kingston to Brockville, on the ground that the case comes within Rule 592 (b). Action for a declaration of plaintiff's right of way over defendant's land in the town of Gananoque, in the county of Leeds, and for an injunction restraining defendant from interfering with plaintiff's use of that way. The parties both reside in Gananoque.

Rule 529 (b) provides that where the cause of action arose and the parties reside in the same county the place of trial to be named by plaintiff shall be the county town of that county.

H. W. Mickle, for defendant.

A. H. F. Lefroy, for plaintiff.

THE MASTER held that the Rule requires that the *whole* cause of action should have arisen in the county: Bertram v. Pursley, 2 O. W. R. 264. Here the whole cause of action did

not arise in Leeds. The execution by the common grantor of the deed to defendant was the beginning, if not the whole, of the alleged cause of action; and this deed was executed at Toronto, and presumably delivered there also. The execution of the deed would properly be considered the *causa causans* of the action: *Orford v. Bresse*, 16 P. R. 332; *Cherry v. Thompson*, L. R. 7 Q. B. 573; *Holland v. Bennett*, [1902] 1 K. B. 867.

Motion dismissed. Costs in the cause.

TEETZEL, J.

OCTOBER 10TH, 1903.

CHAMBERS.

RE STRATHY WIRE FENCE CO.

Company—Petition for Winding-up Order—Previous Assignment for Benefit of Creditors—Refusal of Petition—Discretion—Merits—Leave to Appeal.

Petition by Robert L. F. Strathy, for an order for the winding-up of the company under the Dominion Act. The petitioner had organized the company and was its secretary-treasurer. He petitioned as a creditor for \$466 and also as a shareholder with \$5,900 paid up on his shares. The subscribed capital stock of the company was \$20,450, on which \$19,591 had been paid. The company carried on business for two years, and suffered considerable loss during each year. At a meeting of shareholders held on 16th March, 1903, the insolvency of the company being apparent, a resolution to assign was unanimously passed, and on the 17th March an assignment to G. S. Kilbourn, of Owen Sound, was executed on behalf of the company by its president and by Strathy as secretary-treasurer. A meeting of creditors and shareholders was held on the 26th March, at which Strathy was present, and the assignment was ratified and confirmed, and three inspectors were appointed, one of them being Mr. Creasor, a solicitor who represented Johnson & Nephew, the largest creditors, whose claim was about \$11,000. The total liabilities of the company were about \$20,000. On 30th March Strathy submitted to the assignee an offer of \$16,000 for the entire assets of the company, the payment of the purchase money to be spread over a year. On 9th April he amended his offer by providing for a cash payment of \$2,000, the

balance to be spread over a year. On 11th April an offer by James E. Keenan of \$14,500 in cash was made and submitted to a meeting of assignee and inspectors on that day. Mr. Creasor, assuming to represent Strathy, offered \$15,000 in cash, whereupon Keenan raised his offer to \$16,000 in cash, and it was unanimously accepted by the assignee and inspectors, Mr. Creasor seconding the motion. Before doing so, however, he communicated with Strathy, who said he would not be able to make a further offer before the evening of that day. A bill of sale to Keenan and his associates of all the assets of the company was executed by the assignee and the inspectors on the 15th April, but the money was not paid until 13th May. The petition was filed on the 18th May. The petition was chiefly based upon the contention that the sale to Keenan and his associates should not be allowed to stand, chiefly because of the alleged inadequate price realized, and also because the purchasers were directors of the company, and because the assignee acted improvidently in making the sale without advertising.

R. C. Levesconte, for petitioner.

G. H. Watson, K.C., for the company.

C. A. Moss, for Johnson & Nephew.

TEETZEL, J.—Even if the contentions of the petitioner were well founded, he would be able to obtain redress, notwithstanding the assignment, by an action: see *Hargrave v. Elliott*, 28 O. R. 152; and these questions would be more satisfactorily disposed of in an action than in the Master's office at the instance of a liquidator. . . . The preponderance of evidence supports the view that the sale was in the interests of the creditors, and that more would not have been realized by delaying the sale and having it conducted by public auction or by tender. . . . Under all the circumstances, a winding-up order should not be made, but the assignee should be allowed to complete the administration of the estate. Any creditor who considers himself aggrieved may take such action to impeach the sale as he may be advised. Having regard to the conflicting views as to the absolute right of a creditor to a winding-up order, upon shewing the insolvency of the company, as expressed in *Re Lamb Manufacturing Co.*, 32 O. R. 243, and *Re Maple Leaf Dairy Co.*, 2 O. L. R. 590, the petitioner should have leave to appeal from this order both as to the right to exercise a discretion and upon the merits.

Petition dismissed without costs.

TEETZEL, J.

OCTOBER 10TH, 1903.

WEEKLY COURT.

RE FIELDING and TOWN OF GRAVENHURST.

*Arbitration and Award — Interest on Amount Awarded —
Date of Commencement — Publication — Confirmation
— Judgment.*

Motion by the corporation of the town of Gravenhurst for an order to amend a writ of fi. fa. by limiting the amount of interest directed to be levied, to interest from the date of entering judgment upon an award. The award was published on the 26th September, 1902, under the Municipal Act, fixing the price to be paid by the corporation to Robert Fielding for an electric plant at \$18,012. By sub-sec. 4 of sec. 566 of the Municipal Act, as amended by 63 Vict. ch. 33, sec. 30, the municipality had three months from the publication of the award within which to accept or reject it. No appeal having been launched and no notice of refusal to accept given, the award became absolute and enforceable against the town on the 26th December, 1902, but the town had not raised sufficient money to pay the price, and it was not until May, 1903, that a by-law for that purpose was carried, and further delays followed from the town not having been able to make sale of its debentures, and in the meantime Fielding remained in possession of the plant at the request of the town, and he benefited by whatever profits may have been made out of operating it. Shortly after the award became absolute Fielding commenced and continued to urge the town to raise the money and take over the property. On 5th May, 1903, as a term for his continued indulgence, he obtained from the corporation a consent that the award might be enforced in the High Court in the same manner as a judgment. Under sec. 466 of the Municipal Act, and pursuant to the consent, an order was obtained on 3rd September, 1903, directing that judgment for the amount of the award might be entered in favour of Fielding. Neither in the award nor in the order was any provision made for payment of interest. Fielding, relying on sec. 116 of the Judicature Act and Rules 866, 869, issued a fi. fa. for the amount of the award and interest from the date of publication.

R. D. Gunn, K.C., for the corporation.

R. McKay, for Fielding.

TEETZEL, J. . . . In my opinion interest upon the amount of the award is recoverable only from the 26th December, 1902, at which date the award became absolute and

might have been enforced by summary application under sec. 466, or by action for specific performance. . . . The amendment to the statute and the award must be read together to determine the date when the moneys are payable, and the effect of the statutory provision is the same in postponing the right to enter judgment upon the award as if the date for entering judgment was set forth in the award itself. Order made directing that execution be amended by providing that interest be computed from the 26th December, instead of the 26th September, 1902.

It was also argued that no interest should be payable by the town before judgment was entered, because the owner remained in possession. This question cannot be determined upon this application, but this order should not prejudice the corporation in taking steps to compel Fielding to account for rents and profits.

No order as to costs.

OCTOBER 10TH, 1903.

DIVISIONAL COURT.

BANFIELD v. HAMILTON BRASS MFG. CO.

Principal and Agent — Agent's Commissions — Territory — Contract.

Appeal by defendants and cross-appeal by plaintiff from report of Master in Ordinary upon a reference to ascertain the amount due to plaintiff for commissions upon the sale of cash registers for the defendants.

G. Lynch-Staunton, K.C., for defendants.

C. Millar, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by

FALCONBRIDGE, C.J.:—The Master was clearly right in holding that the city of Vancouver and the towns of Macleod, Calgary, and Edmonton, were "on the C. P. R. west," and therefore within the limits of the territory assigned to plaintiff by the contract sued on. Plaintiff's territory extended to Montreal inclusive, which shewed that it was not confined to the Province of Ontario.

The agreement is not technically, but colloquially, phrased, and no one concerned would have in mind that Macleod and Edmonton were situated on lines which were not part of the system of "the C. P. R. west." As a matter of fact those lines are part of that system, operated by the Canadian Pacific Railway Company, and shewn on the official maps of their line. Defendants' appeal therefore fails.

As to plaintiff's 3rd item of appeal, the Master has come to the proper conclusion: (1) As to the sales made by Hossack, on the ground on which the Master bases his judgment, and on the further ground that Hossack was appointed with the concurrence of plaintiff and received the full commission. (2) Victoria, B.C., is not in plaintiff's territory. He might as well claim Yokohama or Hong Kong. (3) The Hanaman sale was not made in plaintiff's territory.

Both appeals dismissed. No costs.

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MACMAHON, J.

OCTOBER 12TH, 1903.

CHAMBERS.

CALDWELL v. BUCHANAN.

Libel — Pleading — Defence — Privilege — Scandalous and Irrelevant Statements.

Appeal by defendant from order of local Judge at Perth striking out certain parts of the 4th paragraph of the statement of defence in an action for libel as being scandalous and embarrassing. The plaintiff was a miller and manufacturer residing at the village of Lanark, and was for many years a member of the congregation of St. Andrew's Presbyterian Church in that village, of which the defendant was minister in charge. In the year 1900 the presbytery of Lanark and Renfrew authorized certain members of that congregation, among whom was the plaintiff, to hold services in the town hall in the village of Lanark, and such members were in August, 1901, organized as a mission congregation. The alleged libels were as follows: "But here they are in the hall, the followers of W. C. Caldwell, who has backed up drunkenness all his life, and whose theory is that it is no harm for a man to get on the spree occasionally. Their congregation in the hall is the most drunken rabble ever congregated together, I believe, for such a purpose." "I only know of five men that are members that are with Caldwell that don't get drunk, and most of these are men of weak mind that can be twisted any way." "Even Mr. Caldwell has admitted my influence and told a party that I had too much influence in the community. Yes, I have, I suppose, too much to suit him, but he should have reckoned that influence before he turned his attacks on me." "Is it a sufficient reason for a minister to abandon his post of duty when a man whom we know as a scoffer of God's word, together with a few drunken characters, rises up first against the leading men

in the congregation and then against myself?" The defendant pleaded privilege in that the statements complained of were contained in a private and confidential correspondence with two other ministers, who had an interest in the matter, and were so made bona fide and without malice and solely with a view of promoting the interests of the church and of the congregation, and set out at length the circumstances under which the statements were written. In stating these circumstances, the following words were used, which were those struck out by the local Judge: "For some time prior to the year 1900 a considerable amount of drunkenness had prevailed amongst certain of the members of the defendant's said church, to the manifest injury of the welfare of the congregation and to the detriment of the cause of religion in the locality, and efforts had been made by the session of the said congregation to correct or lessen this evil, with the result that one J. M. (naming him), an offender, was dealt with and subsequently suspended from the membership of the congregation on the charge of drunkenness. The plaintiff espoused the cause of the said M. and sought to obstruct the session in the discharge of what it conceived to be its duty, amongst other things publishing an abusive and scurrilous circular bitterly attacking the members of the session. The plaintiff was thereupon summoned before the session on the charge of having circulated among the members and adherents of the church a circular containing libellous and derogatory matter against the said session, and after trial upon such charge was suspended from the membership of the church. The plaintiff thereupon appealed to the presbytery of Lanark and Renfrew against the sentence of suspension pronounced by the session, and pending said appeal, at the instance of the said presbytery, and for the sake of peace and in order to avoid as far as possible the scandal to the church attaching to such proceedings, an agreement was entered into by the said session to restore the plaintiff to membership of the church on his agreement to voluntarily withdraw from membership of the said congregation and to apply for a certificate of withdrawal within three months' time."

J. H. Moss, for defendant.

Grayson Smith, for plaintiff.

MACMAHON, J., held, that under the practice prior to the Judicature Act it was unnecessary to specially plead privilege. But since that Act privilege must be specially pleaded, and facts and circumstances must also be stated shewing why and how the occasion is privileged: Rule 298; Odgers, 3rd ed., p. 563. The parts of the paragraph directed to be struck out

must be regarded as scandalous, i.e., offensive and irrelevant, and as tending to embarrass the trial of the action. They were also open to the objection that they attempted to set up what virtually amounted to a justification, without actually justifying the alleged libellous statements. Appeal dismissed with costs to plaintiff in any event.

MACMAHON, J.

OCTOBER 12TH, 1903.

CHAMBERS.

RE KARN.

Will—Construction — “My own Right Heirs” — Period of Ascertainmant — “Then” — Division of Residue — Specific Devisee Entitled to Share.

Motion by the surviving executors of the will of the late Jacob Karn, the elder, for an order declaring the construction of his will, which was executed on the 2nd July, 1867. The testator died on the 20th July, 1874. Part of clause 6 of the will was: “And I also give and bequeath to my said daughter Marilla the north-west quarter of said lot No. 27 in the 12th concession of East Zorra, to hold the same to her free from any interruptions, curtesy, claim, right, or demand, by her present or any future husband, or for liabilities or debts by him contracted, for her natural life; and after her death I give, devise, and bequeath the same to my granddaughter Louisa, the daughter of the said Marilla, but if my said granddaughter Louisa be not then alive, the same I give and bequeath to her children lawfully begotten, in fee, but failing such children then alive, to my own right heirs absolutely forever.” Marilla Cummings died on the 30th December, 1902, testate. Her daughter Louisa had predeceased her, unmarried.

J. S. Mackay, Woodstock, for the executors and some of the next of kin of Jacob Karn.

J. G. Wallace, Woodstock, for the executors of Marilla Cummings and for John Karn and Catharine Adams.

MACMAHON, J., held, that the word “then” twice used refers to the same event, the death of Marilla. The right heirs of the testator were those existing at the date of Marilla’s death: Theobald on Wills, 5th ed., p. 312; Long v. Blackall, 3 Ves. 486; Wharton v. Barker, 4 K. & J. 483; Re Morley’s Trusts, 25 W. R. 825; Sturge v. Great Western R. W. Co., 19 Chv. D. 444; Re Milne, Grant v. Heyshaw, 59 L. T. N. S. 628; Harvey v. Harvey, 3 Jur. 949.

The executors were authorized to sell various portions of the real estate mentioned in the will, but they were not empowered to sell this particular piece of land.

By clause 7 the testator devised all the rest of his estate to his executors in trust to sell and divide the proceeds "amongst all my children who may survive me in equal shares." Marilla, as one of the children of the testator, was held entitled to share in the residue.

Order accordingly. Costs of all parties—those of the executors as between solicitor and client—to be paid as a first charge out of the proceeds of the sale of the north-west quarter of lot 27.

MACMAHON, J.

OCTOBER 12TH, 1903.

WEEKLY COURT.

OSTERHOUT v. OSTERHOUT.

Will—Construction—Bequest of Personality—"Reversion"—Gift over—Absolute Interest.

Motion by plaintiff for an injunction restraining defendant, one of the executors of the will of his son, Wilfred E. Osterhout, deceased, from dealing with the estate. By consent the motion was turned into a motion for judgment declaring the construction of the will.

The will directed that the testator's real estate should be sold, "and one-half of the proceeds thereof I give, devise, and bequeath to my father, Martin Osterhout (the defendant), with reversion to my brother Herbert G. Osterhout (the plaintiff), on the decease of my father, and the remaining one-half of the proceeds of my real estate I give, devise, and bequeath to my brother Herbert G. Osterhout, his heirs and assigns forever. I further give, devise, and bequeath to my father, Martin Osterhout, one-half of my ready money, securities for money, and money deposited . . . and one-half of all other my real and personal estate whatsoever and where-soever, with reversion to my brother, on the decease of my father." And the other half he gave to his brother, his heirs and assigns forever. The plaintiff and defendant and one Flagler were appointed executors.

At the time of the death of the testator there was \$7,000 on deposit to his credit in a bank, and this sum was divided by the three executors equally between plaintiff and defendant.

This was the only part of the estate in question in this action.

George Kerr, for plaintiff, contended that the defendant, the father, was entitled only to a life interest in the moneys bequeathed to him.

W. E. Middleton, for defendant, claimed an absolute interest.

MACMAHON, J., referred to and quoted from *Percy v. Percy*, 24 Ch. D. 616; *Richards v. Jones* [1898] 1 Ch. 438; *In re Elma Walker*, [1898] Ir. R. 1 Ch. 5; *Henderson v. Cross*, 29 Beav. 216; *Walkim v. Wilkins*, 3 M. & G. 622; *Bowes v. Goslett*, 27 L. J. Ch. 249; and proceeded:

The bequest in the will of Wilfred E. Osterhout in favour of defendant is "with reversion to my brother on the decease of my father."

The word "reversion" is meaningless in so far as it attempts to create a gift over in favour of the testator's brother.

I have examined carefully the cases relied upon by counsel for plaintiff.—*Bibbons v. Potter*, 10 Ch. D. 733; *Sanford v. Sanford*, [1901] 1 Ch. 939; *Williams v. Pounder*, 56 L. J. Ch. 113; *Constable v. Bull*, 3 DeG. & Sm. 411. . . .

In my opinion the case in hand is widely distinguishable from the above cases.

There will be judgment declaring that defendants took an absolute interest in the moneys and securities for money, &c.

No costs.

FALCONBRIDGE, C.J.

OCTOBER 12TH, 1903.

WEEKLY COURT.

CHANDLER v. GIBSON.

Improvements—Allowance for — Mistake — Title—Use and Occupation—Interest—Parties.

Appeal by plaintiffs from report of local Master at Chatham and cross-appeal by defendant Scane from the same report. The Master found that the value of the lands in question in this action, which had been enhanced by the lasting improvements made by defendant Scane under mistake of title since the date of the deed from Moses Chandler to him, was \$1,119.60; that the value of the lands at the date of the deed was \$1,000; that the present value of the lands is \$2,100, and the increase was attributable wholly to the lasting improvements: that the plaintiffs were entitled to \$305 for use and occupation from the death of Moses Chandler to 22nd July, 1902, and from that date to the time of delivery of possession to plaintiffs to an annual rent of \$100 and taxes: that the sum in excess of occupation rent to which defendant

Scane was entitled for lasting improvements was \$814.60, to be further reduced by the amount of the occupation rent since the 22nd July, 1902.

M. Wilson, K.C., for plaintiffs.

D. L. McCarthy, for defendant Scane.

FALCONBRIDGE, C.J.:—The findings of the Master that the value of the lands at the date of the deed from Moses Chandler to defendant Scane was \$1,000, and that the present value thereof is \$2,100, and that the increase is attributable wholly to the lasting improvements, are entirely borne out by the evidence. The Master also worked up the improvements item by item, and, except for the negligible difference of \$19.60, the same result is arrived at. In this view it is not relevant or material to pursue a nice inquiry whether tenant for life or years would have made any of these improvements at all events and for his own immediate benefit. The position that allowance ought not to be made for what defendant Gibson did is not tenable. He is a party to the action; he never completed his purchase or paid anything to Scane. Assuming that the Master allowed the full rent of the improved land, interest on the outlay ought to be allowed. *Munsie v. Lindsay*, 11 O. R. at p. 53, referred to. Report referred back to be varied by deducting \$19.60 from the sum allowed to defendants, and by allowing defendants interest on the money expended on improvements. No costs of appeal.

MACLENNAN, J.A.

OCTOBER 12TH, 1903.

CHAMBERS.

METALLIC ROOFING CO. OF CANADA v. LOCAL
UNION No. 30, AMALGAMATED SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION.

*Appeal — Leave — Extension of Time — Parties — Service of
Writ of Summons.*

Motion by plaintiffs for an order extending the time for appeal and for leave to appeal from an order of a Divisional Court (2 O. W. R. 183) of the 4th March, 1903, setting aside the service of the writ of summons on one J. H. Kennedy for the defendant association. On the 6th March, 1903, an order was made on consent authorizing representation of members of the association by individual defendants. On the 5th October, 1903, an order was made by MacMAHON, J.,

dismissing an application for an order for representation of the association. An appeal from this order is pending.

W. N. Tilley, for plaintiffs.

J. G. O'Donoghue, for defendants.

MACLENNAN, J., held, having regard to the consent order of 6th March, and to the fact that an appeal is pending from the order of 5th October, that the plaintiffs should have leave to appeal and the time extended for appealing from the order of 4th March.

CARTWRIGHT, MASTER.

OCTOBER 13TH, 1903.

CHAMBERS.

THORP v. WALKERTON BINDER TWINE CO.

Venue — Change of — County Court Action — Witnesses — Expense.

Motion by defendants to change venue in a County Court action from Guelph to Walkerton. The action was in respect of certain shares in the defendant company, whose office was at Walkerton. The plaintiff did not require any witnesses except himself. The defendants said they would require 4 or 5 who were at Walkerton.

G. H. Kilmer, for defendants.

J. J. Drew, Guelph, for plaintiff.

THE MASTER held that justice would be done by making the change asked for, upon defendants undertaking to pay all the additional expense properly arising thereupon to plaintiff. *Drew v. Fort William*, 2 O. W. R. 467, referred to. Order accordingly. Costs in the cause.

STREET, J.

OCTOBER 13TH, 1903.

CHAMBERS.

SEXTON v. PEER.

Parties—Mortgage Action—Death of Plaintiff—Assignment of Portion of Interest — Revivor—Executors—Assignee —Reference—Rules 659, 753.

Motion by executors of William Sexton, the original plaintiff in this mortgage action, to set aside an order of the local registrar at Hamilton of 11th September, 1903, allowing one Harold L. Lazier to continue the proceedings in his own name.

J. H. Spence, for applicants.

W. E. Middleton, for Lazier.

STREET, J., held, upon the evidence, that only a part of the interest of William Sexton, the original plaintiff, was transmitted to Lazier, and that a substantial interest was retained by him, although subject to the rights transferred to Lazier. Under these circumstances it was not competent for Lazier to have himself substituted for the executors, because they are still entitled under the judgment to prosecute the proceedings, notwithstanding that since the judgment Sexton had parted with a part of his interest. The matter is still before the Master under Rule 753, and there should be no difficulty under Rule 659 in having Lazier added either upon his own application or upon that of persons parties to the action with whom he is acting, as a party defendant in the Master's office, and in his having the reference continued under Rule 753. Order set aside with costs.

MACLAREN, J.A.

OCTOBER 13TH, 1903.

WEEKLY COURT.

RE DICKSON AND ST. ANDREW'S COLLEGE.

*Vendor and Purchaser — Interest — Possession — Attornment
of Tenant — Costs.*

Motion under the Vendors and Purchasers' Act. After the motion was made the vendor put herself in a position to make title by procuring the widening of the lane or right of way from Dickson avenue to Summerhill avenue (in the city of Toronto), which was effected on the 22nd July last. The question now was, from what date interest should run on the sum of \$7,000 which by the agreement of 29th December, 1902, was to be paid by the purchaser upon receiving a proper conveyance of the lands in question, including the streets known as Clarewood avenue and Dickson avenue, with a good title thereto, and upon the purchaser getting possession of the easterly ten acres occupied by one McKim as tenant, the conveyance and possession to be given on 15th April, 1903. or within a reasonable time thereafter, the agreement being silent as to interest on this sum. The agreement as to possession between the purchaser and Nelson, who was the tenant of the western portion of the land in question, provided that it should not come into effect unless and until a conveyance of the lands was obtained from Mrs. Dickson. In dealing with McKim, the tenant of the eastern portion of the lands, no such reservation or condition was made, but the purchaser accepted an attornment from McKim, who was to remain as tenant at will of the purchaser, paying a rental of \$7 a month. It was the possession of the latter portion only that was referred to in the agreement of 29th December,

1902, the agreement as to possession of the western portion having apparently been made before that day.

C. P. Smith, for purchaser.

F. E. Hodgins, K.C., for vendor.

MACLAREN, J.A., held that the unconditional acceptance of McKim as a tenant was a sufficient taking possession to render the purchaser liable to interest from the 15th April, McKim being the purchaser's tenant from that time. The vendor, having put herself in a position to shew title only on the 22nd July, after the motion had been made, must pay the costs of it.

BOYD, C.

OCTOBER 13TH, 1903.

TRIAL.

ARCHER v. SOCIETY OF SACRED HEART OF JESUS.

Religious Society—Expulsion of Member—Insanity—False Imprisonment—Compensation for Services—Findings of Jury.

Action by Mary Archer against the society, the Mount Hope Institute, and Elizabeth Sheridan, mother superior of the institute, to recover the value of plaintiff's services to the society, of which she was a member, as cook and servant, and to recover damages for false imprisonment as a lunatic, expulsion from the society, and sending false reports to the head officers of the society.

Defendants pleaded, among other defences, the payment to plaintiff of \$300 and a release from her of all causes of action, the Statute of Frauds, and the Statute of Limitations. The jury found a verdict for plaintiff for \$3,000 as compensation for services, and \$5,000 for dismissal.

F. P. Betts, London, for plaintiff.

J. Magee, K.C., for defendants.

BOYD, C.:—The Court should not uphold the release on the ground that plaintiff retains the \$300 and does not offer to repay it. Upon all the circumstances the jury have found the release not binding on plaintiff, and to the charge on this head there was no objection. The signing of that release the jury have in effect found to be improvident, and made at a time when plaintiff was without any advice or protection. It is also to be noted that the money was paid by the lady superior as a gratuity only and not as a settlement of any recognized claim.

It does not appear that plaintiff had any legal or equitable claim in respect of wages or compensation in lieu of wages for the period of her novitiate. She had entered the religious society on the conditions set forth in the constitutions, wherein she had been instructed, and as a lay sister was bound to serve without wage or reward. So long as she remained in the society no pecuniary claim could arise; her services had been compensated from day to day by the enjoyment of the communal life. Nor could she complain when discharged from that life unless that severance was made without good cause.

It is the dismissal which according to the finding of the jury gives ground of complaint, and the damages for that wrongful dismissal (as found by the jury) are what plaintiff may be regarded as having lost for the future, estimated at \$5,000. For this sum the verdict has to be maintained, though the amount is excessive. The constitution of the society does not in terms provide for cases of insanity supervening prior to the final vows. No doubt during the unsound period the vow of obedience would not be operative, and had the actual dismissal been during any period of mental unsoundness, there would be more difficulty in plaintiff's way.

The jury must be taken to have affirmed temporary insanity and to have absolved defendants from liability as to the deportation and incarceration of plaintiff at Long Point asylum. But on the undisputed facts she was declared by the authorities at that institution to be completely recovered in the middle of August, 1901, and the release from her vows (which was the order of dismissal) was not given to plaintiff till the 6th September, when she was in full possession of her faculties. The constitution calls for the existence of grave cause before any one can be sent away from the society, and upon this issue, in which the onus lay on defendants, they have failed to satisfy the jury. Though the ultimate control in matters of dismissal rests with the authorities in France, yet there is power of delegation given by the constitution, and the release from vows was in this case forwarded from Paris to be acted on by the lady superior at London. Ontario, according to her discretion. There was a cause of action within this Province when that discretion was exercised adversely to plaintiff, and the release transmitted from London to be given to plaintiff at Montreal.

The defendants the Mount Hope Institute are not implicated in this transaction, and as against them the action should be dismissed with costs.

Judgment for plaintiff for \$5,000 against the other defendants, with costs of so much of the action as relates to the claim for dismissal.

As to the other issues judgment is to be entered for defendants, with so much of the costs of the action as are applicable thereto.

Costs of all defendants to be set off against plaintiff's judgment and costs.

CARTWRIGHT, MASTER.

OCTOBER 14TH, 1903.

CHAMBERS.

DELAP v. CODD.

*Security for Costs—Residence of Plaintiff Corporation—
Dominion Incorporation—Head Office.*

Motion by defendant Armstrong for an order requiring plaintiffs to give security for costs.

It was admitted that the plaintiff Delap resided in England, and the question was whether the plaintiffs, the Great North West Central Railway Company, resided in Ontario.

C. A. Moss, for applicant.

F. Arnoldi, K.C., for plaintiffs.

THE MASTER.—By 58 & 59 Vict. ch. 48, sec. 2 (D.), the head office of the railway company was changed from Ottawa to Toronto. This Act was assented to on 28th June, 1895. By 1 Edw. VII. ch. 63, sec. 2 (D.), assented to 23rd May, 1901, it was enacted that the head office of the railway company should be at Montreal, but power was given to the directors to change it by by-law to any other place in Canada. On 2nd June, 1903, a by-law was passed fixing the head office at Toronto from 1st June, 1903, to 1st May, 1904.

The present action was commenced, so far as relates to defendant Armstrong, after the passing of the by-law of 2nd June, 1903.

It is laid down in the Am. & Eng. Encyc. of Law, vol. 7, p. 694, that "the residence of a corporation is in the sovereignty by which it was created." It follows from this that the residence of the company is the Dominion of Canada, and that the company is resident in every part of it. If this is so, it must be specially true that it is to be deemed resident in Ontario when its head office is in Toronto.

[Kavanaugh v. Cassidy, 5 O. L. R. 614, 2 O. W. R. 27, 143, 303, 391, and McLaughlin v. Rodd, 2 O. W. R. 309, referred to.]

Motion dismissed with costs to plaintiffs in any event.

CARTWRIGHT, MASTER.

OCTOBER 14TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO v.
LEADLEY.*Pleading—Defence—Action Brought in Name of Company
—Questioning Right to Use Name—Practice—Motion
to Stay Proceedings.*

Motion by plaintiffs to strike out paragraph 25 of the statement of defence of defendants, the Leadleys, paragraph 9 of the statement of defence of defendant, John T. Moore, and paragraph 10 of the statement of defence of defendant Annie A. Moore.

The nature of the action appears from the report of a former motion, ante 745.

J. J. Maclellan, for plaintiffs.

J. W. St. John, for defendants, the Leadleys.

A. J. Russell Snow, for defendants, the Moores.

THE MASTER.—The language of the objectionable paragraphs is varied, but the substance of all is, that the shareholders who are prosecuting the action have no right to use the name of the company; and that, if they have any grievance, they should sue in their own names, framing their action as was ordered in *Murphy v. International Wrecking Co.*, 12 P. R. 423.

To this way of setting up this defence the plaintiffs object. They rely on the case just cited, also on *Austin Mining Co. v. Gemmell*, 10 O. R. 696, at p. 705. . . . A similar rule was laid down in *McDougall v. Gardiner*, 1 Ch. D. 13, 22. . . .

These cases seem clear and conclusive of the point at issue. The motion must be allowed with costs to plaintiffs in any event.

The plaintiffs are at liberty to proceed as was done in *Murphy v. International Wrecking Co.*, if so advised. The material used on this motion can be used in that event, and also supplemented by either party.

STREET, J.

OCTOBER 14TH, 1903.

CHAMBERS.

POSTLETHWAITE v. McWHINNEY.

Writ of Summons—Service out of Jurisdiction—One Defendant in Jurisdiction—Rule 162 (f), (g)—Claim for Injunction—Necessary Party in Ontario—Service on before Leave to Issue Concurrent Writ.

Appeal by defendant Sarah Ann Postlethwaite from order of Master in Chambers, ante 794, dismissing motion by appellant to set aside order allowing the issue of a concurrent writ of summons for service out of the jurisdiction, to set aside the writ issued pursuant thereto, and the service upon the appellant, and all other proceedings, upon the grounds that the material upon which the order was made was insufficient, and that the plaintiff's claim did not come within any of the clauses of Rule 162 (1).

The plaintiff was the husband of defendant Sarah Ann Postlethwaite, to whom he was married in England, in 1878. On 22nd August, 1883, they entered into a separation agreement under seal, by which he agreed to pay to a trustee for her a weekly sum so long as they should live apart, and she should continue to lead a chaste life. Plaintiff came to Canada, and his wife remained in England. In 1900 a new separation agreement under seal was drawn up and executed by the husband and wife and the former trustee, and by defendant McWhinney, a solicitor in Toronto, who had agreed to act as a trustee for the wife in the place of the former trustee. By this plaintiff agreed to pay to defendant McWhinney, as trustee for the wife, \$15 a month. The payments being in arrear, an action was brought in a Division Court in Ontario by McWhinney against plaintiff to recover them. Thereafter plaintiff brought the present action to set aside the agreement, on the ground that it had been obtained by fraud. The writ of summons and a concurrent writ for service out of the jurisdiction were issued on 25th June, 1903, an order for leave to serve defendant Sarah Ann Postlethwaite, as a British subject out of the jurisdiction, having been obtained on 24th June. The writ for service within the jurisdiction was served on McWhinney on 8th July, 1903, and the concurrent writ was served on the other defendant in England in August. The statement of claim served with the latter claimed an injunction to restrain defendants from proceeding with the pending action in the Division Court.

On 29th June, 1903, on the application of plaintiff (defendant in the Division Court action) an order was made by

As the practice in this Province has been hitherto unsettled, I think the allowance of the appeal should be without costs.

STREET, J.

OCTOBER 14TH, 1903.

WEEKLY COURT.

RE FARMERS' LOAN AND SAVINGS CO.

Company—Winding-up—Compromise of Claim by Liquidator—Approval of Referee—Application by Debenture Holders for Leave to Appeal as a Class—Previous Appointment of Solicitors to Represent Class—Special Purpose—Costs.

The company being in liquidation under the provisions of the Winding-up Act of Canada, and the Winding-up Amendment Act, a controversy arose between the debenture holder creditors and the savings bank deposit creditors as to their respective priorities. Meetings were held and representative creditors of each class were appointed by the Master in Ordinary, to whom the powers of the High Court had been delegated under sec. 20 of the amending Act. By the same orders Messrs. Henderson and Small were appointed to act as solicitors for the debenture holders as a class in certain specified appeals, "and to represent the interests of the debenture holders as a class in the winding-up proceedings," and Messrs. Kerr, Davidson, and Paterson were similarly appointed to represent the other creditors. Subsequently Mr. Neil McLean, an official referee, was appointed referee under sec. 20 of the amending Act, with the powers of the Court, in the place of the Master in Ordinary.

In 1898 an action had been brought by the company against the executors of James Scott, deceased, to recover large sums of money alleged to be payable by him to the company. He had been vice-president from 1882 till his death, in 1896, and it was alleged that he had become individually liable for all the debts of the company under sec. 37 of R. S. C. ch. 118, and that he was also liable, apart from that provision, in a large sum of money for neglect and misfeasance as a director and vice-president. The action was not brought until the liquidation proceedings had begun, and it was authorized by an order of the Court. It was never brought to trial, but was still pending when on 31st March, 1903, the liquidator entered into an agreement with the executors of Scott to compromise the claims of the company against them for \$11,000 cash, the agreement being declared to be subject to the approval of the Court. The liquidator then applied to the referee under sec. 33 of the Act for his

approval of the compromise. This was opposed by Messrs. Henderson and Small as representing the debenture holders as a class; evidence was taken, and counsel were heard; and on 25th June, 1903, an order was made by the referee approving the compromise and directing it to be carried into effect.

Messrs. Henderson and Small then applied to the referee for leave to the debenture holders as a class to appeal from the order of 25th June, 1903. This leave was refused, and they then appealed from the order refusing leave and from the order of 25th June.

J. T. Small, for the appellants.

W. M. Douglas, K.C., for the liquidator.

W. Davidson, for the other creditors.

W. H. Blake, K.C., for the executors of James Scott.

STREET, J.— . . . The immediate occasion of the appointment of Messrs. Henderson and Small was the dispute between the debenture holders and the other creditors as to their respective priorities in the administration of the assets of the company. . . . There is no special authority under the Winding-up Acts for such an appointment, but the ordinary procedure of the Courts is introduced into liquidation proceedings by sec. 93 of the Winding-up Act, and there is authority under Rule 662 for the appointment of solicitors to represent the different classes upon a reference. Although the immediate object of the appointment was the conduct of the pending appeal, it seems to have been thought proper to appoint the solicitors to represent the class throughout the liquidation proceedings. It is not to be supposed, however, that by such appointment it was intended that an imperium in imperio should be set up. The liquidator is by statute the representative of all classes of creditors, and his power as such was not in the slightest degree impaired or interfered with by the appointment of Messrs. Henderson & Small to represent one class, and of Messrs. Kerr, Davidson & Paterson to represent another. . . . In making the compromise the liquidator acted on behalf of all classes of creditors, the debenture holders included, and there being no contest as to the rights of creditors inter se, there was no occasion for any class representation.

The referee, having decided that the compromise was in the interest of the creditors as well as of the company, was, it seems to me, entirely right in refusing to authorize Messrs. Henderson & Small, on behalf of a class of creditors, to appeal against his decision at the expense of the estate, especially in view of the fact that any individual creditor had the right to appeal at his own expense and risk. . . .

I think, therefore, that the appeal should be dismissed; the appeal against the order approving the compromise cannot be entertained in its present shape because Messrs. Henderson & Small are not authorized, for the reasons I have given, to appeal on behalf of the debenture holders as a class, and must, therefore, also be dismissed.

As to costs, I think I should not give costs against Messrs. Henderson & Small, because the practice under such an appointment as that upon which they have relied does not appear to have been considered in this Province, and the comprehensive form in which it was made no doubt led to their erroneous belief that a trust to act for the debenture holders was cast upon them without reference to the action of the liquidator. On the other hand, I cannot charge the estate in liquidation, or any part of it, with the payment of their costs, in the view I have taken. The costs of the liquidator should come out of the estate.

FALCONBRIDGE, C.J.

OCTOBER 14TH, 1903.

TRIAL.

MORDEN v. TOWN OF DUNDAS.

Municipal Corporations—Contract—Supply of Water—Evidence.

Action for damages for breach of contract as to supply of water and for injury to plaintiff's land.

A. Bell, Hamilton, for plaintiff.

G. Lynch-Staunton, K.C., and H. C. Gwyn, Dundas, for defendants.

FALCONBRIDGE, C.J., gave a written opinion reviewing the evidence and holding that the action was not sustained by it.

Action dismissed with costs.

BRITTON, J.

OCTOBER 16TH, 1903.

CHAMBERS.

RE ATCHESON, ATCHESON v. HUNTER.

Administration Order—Application for—Status of Applicant—Creditor—Judgment.

Application by Thomas Atcheson for an order for administration of the estate of John Atcheson.

D. L. McCarthy, for applicant.

C. A. Moss, for W. J. Atcheson, residuary devisee.

H. F. Hunter, Bowmanville, executor, in person.

BRITTON, J.—As this matter now stands Thomas Atcheson is not a creditor of the deceased. *Campbell v. Bell*, 16 Gr. 115, and the other cases cited in *Holmsted and Langton*, are against applicant. If Thomas Atcheson sues and recovers judgment against the executor, he will bring himself within *Glass v. Munson*, 12 Gr. 77.

I refuse the motion. Thomas Atcheson can, if necessary, sue the executor. This application is notice to the executor and to W. J. Atcheson of the claim; and my decision is without prejudice to any future application, if Thomas Atcheson deems it necessary to make one. No costs.

BRITTON, J.

OCTOBER 16TH, 1903.

CHAMBERS.

MENDELL v. GIBSON.

Summary Judgment—Motion for — Defence—Conditional Leave to Defend—Terms—Payment into Court—Costs.

Appeal by defendant from summary judgment granted by local Judge at Perth.

T. D. Delamere, K.C., for defendant.

Grayson Smith, for plaintiff.

BRITTON, J.—The action is brought upon the covenant of defendant contained in a chattel mortgage dated 20th April, 1899, upon the plant contained in a cheese factory, the chattel mortgage being collateral to a mortgage to plaintiff upon the factory land and building. The writ of summons was specially indorsed for the full amount of mortgage and interest. . . .

On behalf of defendant, George M. Gibson, a brother of defendant, states that in 1900 the plaintiff took proceedings to sell the factory and its contents; that no sale was then effected, but plaintiff took possession; that on or about 7th August, 1902, plaintiff made an agreement for sale of factory and contents to one Alvin W. Mitchell for \$750; that Mitchell in March or April, 1903, removed the machinery from the factory and removed a portion of the factory itself; and that no portion of the chattels are at present on the premises or anywhere in the vicinity. The plaintiff replied to this affidavit by saying that he was only in possession of the property "to preserve the same."

He says that Mitchell said nothing, and that if Mitchell removed any of the machinery or part of the factory he did so contrary to his agreement, and to plaintiff's express direction.

That is not a full answer, and it leaves the matter in an unsatisfactory state. No affidavit of Mitchell is put in. By the agreement Mitchell was entitled to possession until default, and even if he paid nothing, there was no default until 1st May, 1903.

It is not at all clear that there is no defence to this action. . . . It would have been much more satisfactory if plaintiff had given the time necessary to procure an affidavit from defendant himself.

On the other hand the address of defendant is not given. He is "in the North-west," and his brother is speaking for him, and there are circumstances which point to the possibility of defendant not desiring personally to resist plaintiff's claim. It is a case in which I think the defendant, if let in to defend generally, should be put upon terms, such terms as will to some extent protect plaintiff if he is in the right and will not be oppressive to defendant.

If defendant pays into Court within one month \$150, as security in part to plaintiff, in case plaintiff succeeds, this appeal will be allowed and the order of the local Judge set aside; costs to be costs in the cause to defendant.

If the defendant does not pay the \$150 into Court, then the order is to be varied to the extent of giving the defendant until 1st December next to proceed with the reference under the order of the local Judge, and in other respects appeal to be dismissed without costs.

See *Stephenson v. Dallas*, 13 P. R. 450; *Dunnet v. Harris*, 14 P. R. 437; *Merchants National Bank v. Ontario Coal Co.*, 16 P. R. 87.

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FALCONBRIDGE, C.J.

OCTOBER 7TH, 1903.

TRIAL.

KINGSTON v. SALVATION ARMY.

Religious Institutions—Salvation Army—Action against for Tort—Unincorporated Voluntary Association—Property Holders in Ontario—Trustees.

Action to recover damages for injuries sustained through the running away of a horse frightened by the noise occasioned by persons conducting religious services as members of the Salvation Army (the defendants) in a street in the city of Hamilton. The noise was made by the beating of a drum, etc. The owner and driver of the horse were originally parties, but the action was discontinued against them before the trial.

The action came on for trial before FALCONBRIDGE, C.J., and a jury at Hamilton. The defendants moved for a non-suit.

D'Arcy Tate, Hamilton, for plaintiffs.

A. Hoskin, K.C., and G. Lynch-Staunton, K.C., for defendants.

FALCONBRIDGE, C.J.—The Salvation Army may be aptly described as an unincorporated religious community or society, not seeking any recognition under the law at all, so far at least as concerns property which may be held by the head of the society, or the heads of the community.

There have been filed the declarations of General William Booth, who is the supreme commanding officer, and of the commissioner in this Province, Miss Evangeline Booth. The declaration of General William Booth, which bears date 1884, recites that in 1865 he commenced preaching the Gospel; that a number of people were formed into a community or society by him; that at first this society was known by

certain other names; that other societies were afterwards formed; that divers leases, meeting-houses, lands, etc., were given and conveyed to certain persons upon the trusts therein mentioned; that the labours of the Salvation Army have been extended to the Dominion of Canada; that it is the intention and purpose of the said William Booth to make numerous further purchases of lands in the Dominion of Canada. And then after those recitals William Booth declared, first, that the name and style of the society shall be the Salvation Army. Then follows a creed or confession of faith. Then there is the declaration that the Army is and shall be always under the oversight of some one person under the title of "General;" that he shall have power to expend on behalf of the Army all moneys contributed for the general purposes thereof; that he shall have power to acquire in any or all of the Provinces of the Dominion of Canada by gift, purchase, etc., buildings and lands; that he may in all cases in which he shall deem it expedient so to do nominate and appoint trustees or a trustee of any part or parts respectively of such property, and draw or make the conveyance or transfer to such trustees, with power to himself or to the General for the time being, to declare the trusts thereof; and full right and power reserved to William Booth to mortgage, lease, let, or hire; that he shall continue to be the General and supreme officer; that he and every General who shall succeed him shall have power to appoint his successor to the office; that it shall be the duty of every General to make a memorandum naming his successor, or giving directions as to the means which may be used to appoint a successor; then reciting again that he is now negotiating for the purchase in the Dominion of certain freehold lands, it is now declared by the said William Booth, that all lands whatsoever purchased or acquired by him and now vested in him shall and will be held by him and the General for the time being of the Army in accordance with the tenor, drift, meaning, and intent of these presents: and then he reserves the right to nominate and appoint such persons as he shall think fit to be officers in the Army, and to make powers of attorney, etc. Now that is the whole declaration of trust contained in that instrument.

Then, by deed bearing date the 7th August, 1896, made between Evangeline Cora Booth and the General, after reciting this deed poll which I have just referred to, and reciting further that Evangeline Cora Booth has, on the nomination of the said William Booth, been appointed an officer of the Salvation Army to direct the operations of the Army in Canada, and has, at the instance and with the approval of the said William Booth, purchased and acquired in her

own name by transfer from Robert Henry Booth, her predecessor in said office, and otherwise as may be hereafter purchased and acquired, lands, buildings, etc., and further reciting a request by William Booth to execute a declaration, this indenture witnesseth that the said Evangeline Cora Booth does hereby irrevocably admit and declare that she and her heirs will stand possessed of all lands, buildings, etc., acquired, devised, and bequeathed to her while she was so acting or supposed to be acting as such officer, upon trust for the said William Booth, his heirs, executors, administrators, and assigns, or other the General for the time being of the Salvation Army, and to convey, assign, or surrender or otherwise dispose of the same, as such General shall from time to time direct. She further declares that any real or personal property whatsoever acquired by her shall, until she has conclusively established the contrary to the satisfaction of the said William Booth or other General, be deemed to belong to her as an officer of the said Army, and upon trust for the said William Booth or his successors. Then there is a provision that she shall have the power, so long as he shall not have revoked these powers, to sell, mortgage, and lease, and otherwise deal with the property.

Now, that is the position of the Salvation Army with reference to the holding of property in this country.

Then the only instance in which recognition has at all been sought from or given by Parliament is in R. S. O. 1897 ch. 162, which is an "Act respecting the Solemnization of Marriage," and which provides (sec. 2, clause 3) that, "any duly appointed commissioner or staff officer of the religious society called the Salvation Army, chosen or commissioned by the said society to solemnize marriages," may legally do so.

Both parties have invoked the celebrated Taff Vale case, and both parties have agreed that upon the principles there laid down in that case this judgment must pass. That is a case which was decided by the House of Lords, [1901] A. C. 426, in which the judgment of Mr. Justice Farwell, after an intervening adverse decision, was affirmed, and their Lordships of the House of Lords refer to the judgment of the original trial Judge, Mr. Justice Farwell, with approval.

Now it has been pressed upon me on behalf of the defendants that there are great distinctions between the Taff Vale case and this. The Taff Vale case was what is commonly known as a trades union case, and it is pointed out that there the trades union was registered under the Act, and was given the capacity of owning property and acting by agents. These elements appear to be absent in this case. I refer to the language of Mr. Justice Farwell: "Now, although a cor-

poration and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual, a capacity for owning property and acting by agents, and such capacity, in the absence of express enactment to the contrary, involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents." Further on he says, "The real question is whether, on the true construction of the Trades Union Acts, the Legislature has legalized an association which can own property and can act by agents by intervening in labour disputes between employers and employees, but which cannot be sued in tort in respect of such acts." And he goes on to say that, "The Legislature in giving a trades union the capacity to do these things has given it two of the essential qualities of a corporation."

Now, are these defendants, the Army, within the purview of the Act respecting the Property of Religious Institutions? That is, R. S. O. ch. 307, which provides (sec. 1 (1) that "where any religious society or congregation of Christians in Ontario desires to take a conveyance of land for the site of a church, etc., or for any other religious or congregational purposes whatever, such society or congregation may appoint trustees, to whom, and their successors, to be appointed in such manner as may be specified in the deed of conveyance, the land requisite for all or any of the purposes aforesaid may be conveyed; and such trustees and their successors in perpetual succession, by the name expressed in the deed, may take, hold, and possess the land, and maintain and defend actions for the protection thereof, and of their property therein."

I have grave doubts whether this community is within the meaning of that Act; but, if it were so, I should find it difficult to hold the whole society or organization liable, as they are sought to be held here. The trustees are the corporation under that Act, not the congregation nor the church at large. It has been argued that the expression of the capacity to do something, namely, to hold and possess land and maintain and defend actions for the protection thereof, means the exclusion of the capacity to sue or be sued for wrongs or torts. However that may be, I do not think that the Act is applicable so as to hold the whole society answerable in tort.

Now, there have been various decisions in our own Courts which, I think, point in the same direction. I refer more particularly to the case of the Metallic Roofing Co. of Canada

v. Local Union No. 30, 5 O. L. R. 424, ante 183, also a trades union case, and I think the spirit and meaning of the judgment of the Divisional Court in that case are in accord with the judgment which I am about to pronounce in this. I do not overlook the fact that my learned brother Britton has, upon an interlocutory application in this case, 5 O. L. R. 585, ante 406, seemed to express a different view; but I am, sitting here, obliged to follow what I consider to be judgments binding upon me. Probably if his judgment be read very closely, it does not go so far as to express an opinion which goes to the root of the matter here.

Now here I do not find, even if there is a recognition by the Legislature, in the way in which I have mentioned, authorizing certain officers to perform the ceremony of marriage, that there is anything analogous to the power which was conferred by the Legislature in England upon trades unions; and, further, I do not find that there is any secondary object; there is no commercial object in this. It is quite true that it has been pointed out that the society, or some one for the Army, owns a farm and a newspaper, but I am not told that these are conducted in any spirit of commercial enterprise, or for any particular commercial purpose.

Upon the whole I have a very clear opinion that the objections to the maintenance of this action are well founded and must prevail. It is not necessary for me, in that view, to express any opinion upon the merits of the main case.

I am inclined to think, although I do not so expressly decide, that I should have let the case go to the jury to determine whether or not what took place upon the evening in question did or did not constitute a nuisance or act of neglect on the part of some person or persons. It may be that the remedy of these plaintiffs, if they have any, is against the individual members of the immediate circle of people who were conducting the services upon that evening. Upon that, also, it is not necessary now to express an opinion; but upon the whole, without any hesitation, I have to withdraw the case from the jury, and dismiss the action.

BRITTON, J.

OCTOBER 16TH, 1903.

CHAMBERS.

RE BOSBRIDGE v. BROWN.

Prohibition—Division Court—Judgment—Notice—Waiver—Acquiescence—Laches—Costs.

Motion by defendant for prohibition to the 1st Division Court in the county of Carleton.

The action in the Division Court was begun on the 19th July, 1894. The trial took place on the 26th September, 1894. At the close of the case the Judge reserved his decision, and made this formal note in writing: "Decision adjourned by consent till after judgment is delivered in *Brown v. Gordon* now pending in the Court of Appeal, which sits for argument on 13th November, 1894, provided case is argued at that sitting, but if not argued at such sitting of Court of Appeal, then upon notice by me to the parties for argument of this case, case will be disposed of at such time as I may appoint after I hear argument."

The case stood until 25th March, 1896, when the Judge gave judgment for plaintiff against defendant for \$89.47.

The defendant now alleged that the judgment was given without any notice to defendant as to hearing argument, and without any further argument.

On 5th May, 1903, an order of revivor was made, for the purpose of issuing an execution on and collecting the judgment.

W. H. Barry, Ottawa, for defendant.

G. McLaurin, Ottawa, for plaintiff.

BRITTON, J.—It appears by the affidavits filed that the case of *Brown v. Gordon* was not argued at the November, 1894, sittings of the Court of Appeal.

The plaintiff swears that he believes that there was an argument in due course before judgment was given. His attorney does not remember, but swears to a charge for attending on the argument.

The Judge would not be likely to go in the teeth of his own order. The defendant must have known of this judgment very shortly after, as on the 15th May, 1896, an order was made allowing the examination of defendant as a judgment debtor. On or about 16th July, 1896, a judgment summons was issued upon the judgment and was served upon defendant. This summons was adjourned, and negotiations were had with defendant for the settlement of the judgment. The affidavit of Mrs. McLaurin is clear as to the knowledge of defendant of the judgment, shortly after it was given.

It was quite competent for defendant to waive the argument. It was within the power and right of the Judge to change his order if circumstances arose which would permit of this being done without prejudice to defendant, and it would be presumed in this case, after so long a time, that all was done regularly.

There was no absence of jurisdiction, and so *Re Brazill v. Johns*, 24 O. R. 209, does not apply.

I think defendant, by his negotiation for settlement and by his delay in moving and laches, has waived his right to prohibition, even if there was no notice by the Judge and no argument between 13th November, 1894, and 25th March, 1896. See *Richardson v. Shaw*; 6 P. R. 296; *Re Burrowes*, 18 C. P. 496.

The motion must be refused. . . .

I think the balance against defendant should have been only \$73.67. I cannot correct the judgment, but I think it right, under the circumstances, as the judgment will stand for the full amount, to dismiss this application without costs.

OSLER, J.A.

OCTOBER 16TH, 1903.

TRIAL.

WEBB v. CANADIAN GENERAL ELECTRIC CO.

New Trial — Order Directing — Appeal from — New Trial pending Appeal—No Application to Stay—Judgment.

Action tried with a jury at Peterborough. The jury found a verdict for plaintiff for \$700.

R. M. Dennistoun, Peterborough, for plaintiff.

R. McKay, for defendants.

OSLER, J.A.—On the plaintiff's counsel moving for judgment, it was stated by the other side that an appeal was then pending before the Court of Appeal from the judgment of a Divisional Court setting aside a judgment which had been directed for the defendants by Meredith, J., at a former trial before him in October, 1902, and ordering a new trial. This new trial took place before me. Nothing was said by either party of the pending appeal until judgment was moved for on the verdict of the jury. I then thought it would be advisable to defer giving judgment until the appeal should be disposed of; but upon reflection I have arrived at a different conclusion. Being of opinion that upon the evidence at the last trial the plaintiff is entitled to judgment, it is better that such judgment should now be given in order that an appeal therefrom, should defendants determine to appeal, may be brought on together with the appeal now pending, as was done in the case of *Blackley v. Toronto Street R. W. Co.* My strong impression at present is, that the defendants should have moved to stay the new trial until the appeal from the order directing it was disposed of. Having taken their chances of a new trial without objection, it may be found that they ought to be taken to have abandoned their appeal. But if not, and their appeal should be dismissed, plaintiff ought

not to be delayed in having a second appeal, should there be one, brought on to as early a hearing as possible.

Notice was given to the parties that judgment would be directed unless cause was shewn to the contrary at my Chambers at Osgoode Hall, on the 14th instant, at 10.30 a.m. No counsel appeared before me for either party, and I direct judgment for plaintiff accordingly for the damages assessed by the jury with costs.

MEREDITH, C.J.

OCTOBER 16TH, 1903.

TRIAL.

BASTEDO v. SIMMONS.

Sale of Goods—Action for Price—Acceptance of Part—Entire Contract—Statute of Frauds.

Action for price of goods sold, tried without a jury at Toronto.

W. H. Grant, for plaintiff.

T. H. Lennox, Aurora, for defendants.

MEREDITH, C.J., held that the sale was an entire one of the various articles which formed the subject of it, and defendants, having accepted part, were not entitled to return the remainder of the goods, even if they had not been according to the sample; and the acceptance and receipt of part took the contract as to the whole out of the Statute of Frauds.

Judgment for plaintiff for amount of his claim, less the sum paid into Court. The question of the scale of costs to be determined by the taxing officer.

OCTOBER 16TH, 1903.

C.A.

MAJOR v. MCGREGOR.

Libel—Post Card—Initials "S. B."—Meaning of—Innuendo—Evidence to Support.

Appeal by plaintiff from judgment of BRITTON, J., 1 O. W. R. 839, 5 O. L. R. 81, dismissing with costs an action for libel.

G. F. Shepley, K.C., for appellant.

D. B. Maclellan, K.C., for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

OSLER, J.A.:—The alleged libel was upon a post card written and mailed by defendant to plaintiff.

The defendant, a bailiff for the collector of taxes for the township of Charlottenburg, had demanded payment by plaintiff of certain taxes, and had been referred by him to one Sullivan as the person by whom they ought to be paid. The defendant applied to Sullivan, who refused to pay, and some conversation passed between them on the subject. Thereafter the defendant wrote and sent to plaintiff a post card in these words: "I saw Jack Sullivan this morning: he said make the S. B. pay it. . . ."

The card was addressed to Telephone Major, by which name the plaintiff, whose name is also Zehrien, was sometimes called. He is unable to read. His father or his son, who are also illiterate, got the card from the post office, and gave it to plaintiff's wife, who read it to him. This was the libel complained of.

Ambrose Dunn deposed to a conversation with the defendant about the post card, in which the latter said that he had sent a post card to the plaintiff, his words being, "I sent that post card to that son of a bitch."

There was no other evidence of importance. . . .

It is clear that this appeal cannot succeed. Taken literally and in its primary and obvious meaning the language of the post card is harmless. The defendant simply purports to report to plaintiff Sullivan's words referring to him as "the S. B."—assuming that it sufficiently appears from the whole writing and the address that the words do in fact refer to plaintiff.

If the trial Judge could have taken judicial notice that the letters S. B., like the letters A. D., E. & O. E., F. O. B., etc., were a familiar contraction for some common phrase or ordinary expression, and were commonly or even occasionally used as a contraction for the vulgar epithet which by the innuendo they are alleged to mean, it would have been proper to have left the case to the jury to say whether they were so used or intended to be used by the defendant on this occasion.

It was impossible, however, to argue that the letters had acquired in the vernacular any meaning as a customary abbreviation of any particular phrase or expression. As they stand in the writing they are no more than two innocent letters of the alphabet, initials, it may be conjectured, of two words not intended to be complimentary, but of what two

words and whether of a contemptuous or harmless meaning, is unknown, and not capable of being known either from the letters themselves or from anything in the context.

Words in themselves harmless, such, for example, as boycott, dewitt, beecher, have sometimes, historically or from the circumstances of the time, acquired an injurious meaning, or are capable of being used so as to convey one, and it is then for the jury to say whether they have been so used on the particular occasion; but this cannot be said of the letters in question, and therefore plaintiff fails to shew that by themselves they are capable of a defamatory meaning. Their ordinary English meaning is of two letters of the alphabet, and nothing more. . . .

[Reference to Odgers on Libel and Slander, 5th ed., pp. 106, 107, 115, 116.]

The meaning alleged, and that this was the meaning understood by those to whom the libel was published, must be proved by evidence in the usual way.

Here the plaintiff by the innuendo has undertaken to specify the particular defamatory sense in which the words or letters were used, but of that he has given no evidence, and therefore—the words themselves not being defamatory in their ordinary meaning—he has failed to establish any cause of action.

We considered this subject very fully in the recent unreported case of *Lossing v. Wigglesworth* (noted 1 O. W. R. 460). See also *Capital and Counties Bank v. Henty*, 7 App. Cas. 744; *Neville v. Fine Arts Association*, [1897] A. C. 68; *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 18, p. 973.

Appeal dismissed with costs.

OCTOBER 16TH, 1903.

C.A.

RE TOBIQUE GYPSUM CO.

Company—Winding-up—Judgment against Company—Sale of Lands of Company under Execution—Lands outside the Province—Jurisdiction to Stay Sale in Winding-up Proceeding—Ex Parte Order—Jurisdiction over Purchaser—Setting aside Sale—Summary Powers of Court.

Appeal by Harriet Costigan and James Tibbets, sheriff of Victoria, New Brunswick, from an order of FALCONBRIDGE, C.J., of the 14th October, 1902, made in the matter of the winding-up of the company.

The company having become insolvent within the meaning of the Winding-up Act, R. S. C. ch. 129, a petition was presented to the High Court on the 29th July, 1902, on behalf of the Toronto General Trusts Corporation, executors and trustees under the will of the late Hugh Ryan, a creditor of the company, under the Act. It came on for hearing before Lount, J., in presence of counsel for the petitioners and the company. From affidavits filed it appeared that one Dunne, the secretary of the company, had obtained a judgment against the company in a New Brunswick Court for an amount exceeding \$500, upon which executions were in the hands of the appellant Tibbets, the sheriff, who was proceeding thereunder to expose for sale the lands of the company situated in his bailiwick, and that the sale was advertised to take place on the 1st August. It was sworn that there was reason to believe and apprehend that unless the order declaring the company to be insolvent was made, the sheriff would proceed with the sale on the day named. Lount, J., adjourned the petition for one week, and at the same time made an order that all proceedings in any action, suit, or proceeding against the company be stayed in the meantime. So far as Dunne, the execution creditor, was concerned, this order was *ex parte*, but the evidence shewed that he had already agreed to a postponement of the sale for one month, and had instructed the sheriff to that effect.

On the 29th July the petitioners' solicitors wrote to the sheriff advising him of the order for stay of proceedings. This letter and a letter from Dunne's solicitor dated 30th July, 1902, advising the sheriff of the pendency of the petition and instructing him to postpone the sale for a month, were received by the sheriff before the sale. On the 30th July the solicitor for the petitioners sent to the sheriff a certified copy of the order staying proceedings. The sheriff, nevertheless, on the 1st August assumed to put the lands up for sale, and after two other bids the property was knocked down to Mr. Costigan, the president of the company, bidding, as he said, on behalf of the appellant Harriet Costigan, his wife, at the sum of \$900.

On the 5th August an order was made on the petition declaring the company insolvent and liable to be wound up by the Court under the Winding-up Acts, and a further order was also made appointing James P. Langley provisional liquidator, and referring it to the Master in Ordinary to appoint a permanent liquidator or liquidators, with the usual directions. Copies of these orders were transmitted to the sheriff, who received them on or about the 7th August.

On the 15th August the sheriff executed a deed of the lands to Harriet Costigan, and on the next day she executed a mortgage upon them to one Henry A. Little, of Woodstock, Ontario, to secure an advance of \$1,000. These two instruments were registered. The sum of \$900 was paid to the sheriff, by whom it was placed on special deposit.

On the 14th October, 1902, the liquidator and the petitioning creditors moved, on notice to Dunne, Costigan, Harriet Costigan, Little, and Tibbets, for an order declaring the sale void. Dunne and Little did not appear. The other three opposed the motion.

FALCONBRIDGE, C.J., pronounced an order declaring the sale void and ordering that the conveyance be set aside, and that Harriet Costigan and Little should execute a deed of quit claim, and that the two Costigans and the sheriff should pay the costs of the application.

The appeal was from this order.

E. D. Armour, K.C., for the appellants.

J. J. Foy, K.C., for the respondents, the liquidator and petitioning creditors.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A.) was delivered by

MOSS, C.J.O.:—The appellants contend that the order was made without jurisdiction, because it affects lands in another Province, and because the subject matter was not one proper to be dealt with in a summary manner by a Judge in the winding-up proceedings. It was also contended that the order of the 29th July made by Lount, J., was made without jurisdiction, and that it did not operate as a stay of the proceedings under the execution, and that the sale made on the 1st August was a valid sale and disposition of the property; and further that on the merits the facts did not justify the setting aside of the sale.

The last point was but faintly argued, and we are not called upon to decide it, for we think there was an effective stay of proceedings on the day when the sale took place.

The petition having been presented on the 29th July, there was jurisdiction under sec. 13 of the Act to restrain further proceedings in any action, suit, or proceeding against the company; and the enforcing of an execution is a proceeding within the section: *In re Artistic Colour Printing Co.*, 14 Ch. D. 402.

Further, the jurisdiction to restrain extends to proceedings in actions or suits beyond the ordinary territorial juris-

diction of the Court, more especially when, as in this case, the execution creditor is resident within the jurisdiction: *In re International Pulp and Paper Co.*, 3 Ch. D. 594.

Usually the application is made on notice to the plaintiff in the action or suit, but in a proper case the order may be made on an *ex parte* application. . . .

[*In re London and Suburban Bank*, 19 W. R. 950, *Lindley on Companies*, 6th ed., p. 911, and *Masbac v. Anderson*, 37 L. T. N. S. 440, referred to.]

There appears to be no good reason why this should not be done in these as in other applications for injunctions, where the circumstances of the case do not permit of delay.

Therefore, Lount, J., had jurisdiction to make an order staying proceedings in the action of Dunne against the company.

The order was not specially directed against Dunne or his action, but was general in its terms, and this is objected to.

The more correct practice, and that which should have been followed, is to specify each action or proceeding, and to restrain the proceedings in it, but the departure in this case did not deprive the order of force. The parties to the action were notified of the order, and Mr. Dunne, who was the person most interested, recognized and submitted to it. No doubt, also, it would have been more in accordance with the ordinary practice if the order had contained the usual undertaking as to damages, but it was for the learned Judge to impose such terms as he thought fit. No motion was made against the order, and even now Mr. Dunne does not complain of it. Notwithstanding the order, the sheriff assumed to proceed with the sale at the instance of Mr. Costigan, the president of the company, whose duty it was to have aided in staying the proceedings. He was aware of the petition and also of the order staying proceedings, and there was no excuse for his and the sheriff's conduct in proceeding in the face of it. The order was operative until successfully moved against or the parties were relieved of the stay and given leave to proceed notwithstanding the winding-up proceedings. The argument that there was no valid stay, and that the sale was therefore good, completely fails.

The formidable objection to the order appealed from is that the mode adopted of impeaching the sale and subsequent proceedings is not warranted by the Act. This case is not one coming within the classes of cases which under the Act may be dealt with in a summary manner by a Judge in the winding-up proceedings. In general the summary powers

cannot be exercised against persons who do not come within some or one of the classes of persons specified in the sections of the Act governing the summary exercise of powers. Mrs. Costigan and Mr. Little are entire strangers in the sense that they are not contributories, creditors, officers, or trustees, but they are the persons whose alleged rights in the land are affected by the order.

Parliament has given the Court or a Judge authority under the Winding-up Act to deal in a specified way with given classes of cases in which persons falling under the above descriptions are concerned, but the fact that it has done so does not justify the Court in extending the jurisdiction to other cases not within the terms of the Act: Felton's Executors' Case, L. R. 1 Eq. 219.

So far, therefore, as Mrs. Costigan and Mr. Little are concerned, the case is not one to be dealt with in a summary proceeding.

Messrs. Dunne and Costigan, and perhaps the sheriff, occupy a different position; but the fact that they might be dealt with in a summary proceeding does not create jurisdiction over the others, who are not in their position.

As against Mrs. Costigan and Mr. Little, the order cannot be supported, more especially as regards that part which directs the execution by them of a conveyance or quit claim of the lands. It should, therefore, be vacated; but the circumstances are such as to warrant us in saying that there should be no costs of the proceedings or of the appeal.

OCTOBER 16TH, 1903.

C.A.

PAREAU v. CANADIAN PACIFIC R. W. CO.

New Trial—Divisional Court Setting aside Nonsuit and Directing New Trial—Appeal—Evidence to go to Jury—Negligent Setting out Fire.

The defendants were sued for negligently setting out fire on their track allowance or permitting fire to remain there without taking proper care that it should not extend into adjacent lands of other proprietors, and for allowing dry grass, weeds, and other combustible material to accumulate on their land, which caught fire from fire set out by defendants, and that fire extended therefrom into plaintiff's land, and there did damage.

At the close of plaintiff's case the trial Judge directed a nonsuit.

A Divisional Court (MEREDITH, C.J., STREET, J.) set aside this judgment and ordered a new trial, being of opinion that there was some evidence proper to be submitted to the jury of negligence on the part of the defendants or their servants, which caused the damage complained of.

The defendants appealed.

W. M. Douglas, K.C., and W. H. Curle, Ottawa, for appellants.

G. F. Shepley, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.— . . . If the trial Judge had been trying the case without a jury, I think no one could confidently say that the view he took of the evidence was wrong. But, if there was any evidence from which the jury could reasonably have inferred negligence, they were the judges of it, and the case could not properly have been withdrawn from them. In a case like the present, where there is, in effect, no final judgment in the action, and an appeal from the judgment at another trial cannot be embarrassed by the judgment directing a new trial, an appeal from the latter judgment must and ought always to be exceedingly difficult to maintain.

The question whether, upon the facts as developed at the trial in any given case, there is or is not evidence for a jury, is one which often provokes much diversity of judicial opinion, and where a Divisional Court has after argument come to the conclusion that there was such evidence, it appears to me that, as a general rule, it would be much better that the case should be tried again and the final decision in the action deferred until this has been done, than that another appellate Court should be invited to review the opinion of the first upon the bare question whether the case should or should not have gone to the jury.

In the course of the argument before us it was intimated by several members of the Court in what particulars there seemed to be evidence fit for the consideration of the jury in respect of the facts which go to make up the cause of action in a case of this kind; and, as the judgment of the Divisional Court ought clearly, in my opinion, to be affirmed, it is not necessary for the disposition of the appeal to enter into details.

The appeal should be dismissed.

MEREDITH, C.J.

OCTOBER 16th, 1903.

WEEKLY COURT.

RE MULLIN AND MULLIN.

Arbitration and Award—Time for Making Award—Last Day Falling on Sunday—Application of Judicature Act—Partition—Rights of Co-parcener—Statute of Limitations—Adverse Possession.

Motion to set aside an award made by John R. McKinnon, John Mullin, and Robert Mullin, dated 16th March, 1903, in pursuance of a voluntary submission of the parties dated the 26th February, 1903, by which they referred the differences which had arisen between them as to the partition of certain lands, which were described as being "their property."

A. R. Clute, for the applicant.

C. A. Moss, for the respondent.

MEREDITH, C.J.—It was contended by the applicant that the award was made too late, having been made on the 16th March, 1903, though it was provided by the submission that the award should be made on or before the 15th day of that month.

The 15th March was a Sunday, and if, as Mr. Moss contended, under sec. 49 of the Arbitration Act, the provisions of the Judicature Act are applicable, the objection fails; but if not applicable, the Court has power under sec. 10 to enlarge the time, though an award has been made: Russell on Awards, 8th ed., p. 106; Redman on Awards, 3rd ed., p. 92; and cases cited.

I am inclined to the opinion that Mr. Moss's contention is not well founded; but to avoid any questions as to the applicability of the Judicature Act, as the case is, I think, a proper one for the exercise of the powers conferred by sec. 10, I enlarge the time for making the award until the 1st January next.

The substantial ground of objection to the award is, that the arbitrators made it on the assumption that the applicant was not entitled to the share in the lands which admittedly at one time belonged to his brother Alexander, and which he claimed by conveyance from Alexander.

If the applicant had made a *prima facie* case in support of his claim, I should probably have remitted the matters referred to the arbitrators in order that they might consider it, but the applicant has not, I think, made such a case.

The right of Alexander is admittedly barred by the Statute of Limitations unless the fact that the mother of Alexander and of the parties to the reference lived upon the land with the parties to the reference down to a period within ten years before the partition proceedings which resulted in the reference being made, were begun, operated to extinguish in her favour the title of Alexander and the other heirs of William Mullin, deceased, in which case the persons entitled would be her heirs at law, of whom Alexander is one.

It is clear, I think, that the possession of the lands from the death of William Mullin was not that of the widow, but of such of the heirs at law as lived upon the lands with her: *Fraser v. Fraser*, 14 C. P. 70; *Wall v. Stanwick*, 34 Ch. D. 763; and *Kent v. Kent*, 20 O. R. 445, affirmed 19 A. R. 352.

Mr. Clute relied upon *McArthur v. McArthur*, 14 U. C. R. 544, but that case is clearly distinguishable. The persons who claimed had no title, not being the heirs at law of the owner of the land, which had passed to the eldest son as heir at law; and what was decided was that the widow, who had been in possession as head of the family, and not they, though they resided with her, had acquired title by the operation of the statute—as the result of that possession.

If I am right in this view, it would serve no good purpose to remit the matters referred to the arbitrators, and the order will therefore be that the time for making the award be enlarged until the 1st day of January next, and that the motion be dismissed, and, under all the circumstances, the dismissal will be without costs.

BRITTON, J.

OCTOBER 19TH, 1903.

WEEKLY COURT.

CENTRAL TRUST CO. OF NEW YORK v. ALGOMA STEEL CO.

District Courts—Jurisdiction—Recovery of Land—Ejectment by Mortgagees—Injunction—Mortgagees Proceeding in District Court—High Court Action also Pending.

Motion by defendants to continue injunction restraining plaintiffs from proceeding with an action in the District Court of Algoma for the recovery of the land covered by certain mortgages in respect of which this action (in the High Court) was brought.

G. F. Shepley, K.C., and W. E. Middleton, for defendants.

C. H. Ritchie, K.C., and J. Bicknell, K.C., for plaintiffs.

BRITTON, J.—The plaintiffs on the 24th September, 1903, commenced proceedings by writ of summons issued out of the District Court of Algoma, specially indorsed as follows: "The plaintiffs' claim is to recover possession of all and singular those certain parcels or tracts of land and premises particularly described as follows . . . And for an order that the defendants, their servants, workmen, and agents, do forthwith deliver up possession of the said lands and premises to the plaintiff Benjamin Franklin Fackenthal junior, receiver appointed by the plaintiffs the Central Trust Company of New York, under and in pursuance to the mortgage or deed of trust dated 1st January, 1903, and made between the defendants and the said plaintiffs the Central Trust Company of New York."

Upon the affidavits filed it is difficult to understand why it was deemed necessary for plaintiffs to take the proceedings in the District Court. . . .

But the only questions for my consideration on the present motion are:

1st. Has the District Court of Algoma jurisdiction in such an action for the recovery of possession of land?

2nd. If it has, as the plaintiffs have brought this action in the High Court, where they are asking for practically all that they claim to be entitled to under the mortgage, and where there is unquestioned jurisdiction to give full relief, including possession, shall they be allowed to continue proceeding in the District Court for possession only?

Plaintiffs claim jurisdiction for the District Court under R. S. O. ch. 109, sec. 9; sub-sec. (1) of which provides that the District Courts shall have the same jurisdiction as is possessed by County Courts; and sub-sec. (2), that the District Court of Algoma shall, in addition to the jurisdiction conferred by sub-sec. (1), have jurisdiction "(d) for the recovery of land situate in the district."

Is an action by a mortgagee for the possession of land included in the mortgage an action for the recovery of land within the meaning of the Act above cited?

If it is, the District Court has jurisdiction.

If the writ had been indorsed under Rule 141 with a claim for foreclosure, that claim would at once have ousted the District Court of jurisdiction, or rather would have shewn that the District Court had no jurisdiction to grant the relief asked upon such a mortgage. If the indorsement was or

ought to have been such as is required by the Rules to be in the form prescribed (Appendix, part ii., sec. vi.), then it would be a suit for sale, with a claim for immediate possession pending the sale; it would be more than a suit for the recovery of land, and neither the District Court nor any County Court would have jurisdiction.

The writ was indorsed for an order that the defendants do forthwith deliver up possession. The plaintiffs' claim was simply to recover possession. That, I think, is only "for the recovery of land" within the meaning of the Act cited. "Recovery" may mean more than "recovery of possession." If it does, the greater includes the less.

[Independent Order of Foresters v. Pegg, 19 P. R. 80, distinguished.]

I therefore conclude upon the mere question of jurisdiction: (1) that the indorsement in the case in the District Court was an indorsement under Rule 138; and (2) that it was for "recovery of land" within the meaning of the Act giving jurisdiction to the District Court.

Sub-section 3 of sec. 9 of R. S. O. ch. 109 assists in determining the intention of the Legislature upon the question of jurisdiction. . . . It was evidently intended to open wide the door as to jurisdiction.

I ought not to continue the injunction upon the second ground. It is certainly contrary to the policy of the Courts as law is now administered to permit an action of ejectment and afterwards an action for sale. See *Hay v. McArthur*, 8 P. R. 321. This suit is not for foreclosure or sale. It is for a declaration as to plaintiffs' rights, and if I am right in deciding that the action in the District Court is only for recovery of land and is within the jurisdiction of that Court, I ought not to restrain further proceedings there, merely because the plaintiffs could have their complete recovery in the present action.

The mere question of immediate possession cannot, under the special and unfortunate circumstances now existing, matter much to either party. The plaintiffs are mortgagees in fact and must account for their dealings with the property if the defendants are able to redeem; and the defendants in the present action have the right to attack the mortgage if open to valid legal objections. If the defendants remain in possession, they so remain under injunction as to dealing with the property, and practically are caretakers for plaintiffs.

The injunction should be dissolved. Costs to be costs in the cause.

OSLER, J.A.

OCTOBER 19TH, 1903.

CHAMBERS.

STANDARD TRADING CO. v. SEYBOLD.

Security for Costs—Increase in Amount—Costs Thrown away by Postponement of Trial—Postponement Caused by Defendants' Amendment—Responsibility for Increase in Costs.

Appeal by plaintiffs from order of local Master at Ottawa allowing defendants' application for increased security for costs.

The appeal was heard by OSLER, J.A., holding the Weekly Court and Chambers at Ottawa for a Judge of the High Court.

John T. C. Thompson, Ottawa, for plaintiffs.

C. J. R. Bethune, Ottawa, for defendants.

OSLER, J.A.—The plaintiffs are a foreign corporation, and, under a præcipe order for security for costs, paid into Court the sum of \$200. The action was proceeded with, and subsequently an order was made by MacMahon, J. (1 O. W. R. 724, 5 O. L. R. 8), affirmed by a Divisional Court (1 O. W. R. 783, 5 O. L. R. 8), for the payment into Court of \$300 by way of further security. Afterwards a commission was issued to take evidence in New York, and the Master made an order to pay into Court as additional security \$100 more.

The case came down for trial, and the defendant Booth then applied for liberty to amend his pleadings. Leave to amend was granted, and plaintiff not being prepared to proceed on the amended record, the trial was adjourned.

The Master has now made another order staying the proceedings until the plaintiff shall have paid into Court or otherwise given further security to the amount of \$600. This is the order complained of.

From my point of view such an order is wholly unreasonable. I am aware that the practice on the subject of granting additional security has been relaxed by the modern rules; but I do not think it admits of a plaintiff being checked at every stage of the action by ordering security, dollar for dollar, for all costs incurred, or which by possibility may be incurred, without regard to the conduct of the party.

Here it is quite plain that the costs of the trial have been thrown away mainly by reason of the defendants having insisted upon being allowed to amend their pleadings, or having deemed it prudent at the last moment to do so, when plaintiffs

were ready to proceed. I think it immaterial that the trial Judge made the costs of the day costs in the cause, unless the Judge at the next trial should otherwise order. The point is that the postponement of the trial was really caused by the defendants' amendment. Then, moreover, was the time when all terms, such as the giving of security, should have been discussed. No trial Judge was in a better position than the Master could be to determine whether the plaintiffs were taking an unreasonable view of the amendment as rendering a postponement necessary; and, if the defendants had urged that, notwithstanding the amendment, the trial ought not to be postponed unless the plaintiffs would give additional security, the latter might have reconsidered their position and have taken the risk of going on, if the Judge thought they were really not prejudiced by the amendment at that stage, and ought not to be allowed to postpone except upon terms. As it was, the defendants obtained an indulgence, and ought not, in my opinion, to be permitted now to embarrass the plaintiffs by obtaining what is practically a fourth order for security for costs.

Appeal allowed and order discharged with costs here and below to plaintiffs in any event.

CARTWRIGHT, MASTER.

OCTOBER 20TH, 1903.

CHAMBERS.

DWYER v. GARSTIN.

Venue—Change of—Convenience—Cause of Action—Witnesses—Expense—Undertaking—Security.

Motion by defendant to change venue from London to Toronto.

John MacGregor, for defendant

R. S. Smellie, for plaintiff.

THE MASTER.—The plaintiff resides in London, and the defendant in England.

The cause is at issue, and the pleadings shew that the transaction in question arose mainly, if not wholly, in Toronto.

The defendant's solicitor deposes that they will require the evidence of eight witnesses, who all reside in Toronto. He is of opinion that the plaintiff's witnesses (if he has any except himself) will be found in Toronto also.

The plaintiff deposes to 13 witnesses, all resident at London, but does not state what they will prove. He seems to

admit (para. 12) that he will probably have some witnesses resident in Toronto, but does not say how many.

The affidavit in reply filed by plaintiff's solicitor (para. 3) seems to confirm the view that Toronto was the place where the business between the parties was carried on.

On the argument I suggested that the matter might be settled by the plaintiff undertaking to bear any extra expense of the trial at London. But this was not acceded to. On the other hand, the counsel for defendant was willing to do this.

Having regard to the order of the Chancellor in *McArthur v. Michigan Central R. W. Co.*, 15 P. R. 77, with the reasons for same, and referring to what I said in *Meiers v. Stern*, 2 O. W. R. 392, as to the little weight to be attached to affidavits on motions of this character. I think the order may go; but it is not to issue except on the undertaking of the defendant's solicitor on his client's behalf to bear the extra expense of a trial at Toronto, and on payment into Court of \$100 to meet such extra cost.

The costs of the motion will be in the cause.

In all these cases the question where the alleged cause of action arose is still of importance. It has not now the same weight as in the days of the Common Law Procedure Act: see *Harper v. Smith*, 6 P. R. 9. But it is still useful in deciding where the general convenience requires the action to be tried. And this matter of convenience is, in my view, one of the "substantial grounds" spoken of by Mr. Justice Osler in *Campbell v. Doherty*, 18 P. R. at p. 245, on which there may be a change of venue. This would be more influential in cases like *McDonald v. Park*, 2 O. W. R. 812, or where the plaintiff is claiming under the Workmen's Compensation Act or otherwise for injury. This principle seems to be recognized by sec. 104 of the Ontario Judicature Act in the case of actions against municipal corporations. It would also seem to be the foundation of present Rule 529 (b).

FALCONBRIDGE, C.J.

OCTOBER 20TH, 1903.

TRIAL.

SCOTT v. TOWNSHIP OF ELLICE.

Public Schools—Collection of Rates—Protestant Separate School—School Building—By-law—Petition—Status of Plaintiff.

Action for a declaration that it was and is the duty of the defendant corporation to correct alleged errors or omissions made in the collection of the rate imposed for public school purposes for the year 1902, and for a mandatory order upon defendant corporation to take all necessary steps to correct

such errors or omissions, and to do all things necessary to be done to the end that no property liable shall escape from its proper proportion of the rate, and for a declaration that the by-law passed by defendant corporation to establish a "Protestant separate school" is illegal and invalid, and that no such school has become established thereunder.

J. Idington, K.C., and R. S. Robertson, Stratford, for plaintiff.

G. G. McPherson, K.C., for defendant corporation.

J. P. Mabee, K.C., for individual defendants.

FALCONBRIDGE, C.J.—I find that plaintiff has failed to prove the allegations of fraud and bad faith set up. . . . The trustees state on oath that they intend to provide for the construction of a school building, and the arrangement made about sending the children to Stratford is temporary only.

If by-law 425 is not a valid by-law, it has been amended by by-law 447, which I hold to be good for the purpose of striking out the lots in section 2.

I find that the petition on which the by-law was based was sufficiently signed. It is proved that there was a sufficient number of heads of families signing the petition, although some or one of those signing may not have been heads of families within the meaning of the statute.

It is sworn by Mrs. Drown, the owner of the 20 acres of which plaintiff is tenant, and it is admitted by plaintiff, that he took his lease from her on the understanding and agreement that his taxes on these 20 acres should go to the Protestant separate school. She was a petitioner and party to the formation of the section, and I think that, under these circumstances, plaintiff has no locus standi to ask for the various other declarations of right which he seeks in this action. He asks for a declaration against or affecting many persons who are not parties

Action dismissed with costs.

MACMAHON, J.

OCTOBER 22ND, 1903.

CHAMBERS.

RE KINNEY.

Will—Construction—Charitable Devises and Bequests—Sufficiency of Designation of Trusts and Beneficiaries—Mortmain Acts—Testator Dying within Six Months after Making Will.

Application by the executors for an order declaring the construction of the will and codicil of Joseph Kinney.

The material parts of the will were as follows: "I be-
 quathe all that my hevenly father has given me to that
 Presbyterian congregation where I belong to and had my first
 communion, Churchtown, or better known by the name of
 Tamlight O'Crilly, Co. Derry, Ireland. The presiding clergy-
 man, comittee, and elders to have full controll of all after me.
 They shall have the power to sell or rent to the best advantage
 while grass grow or water run. . . . The minister and
 comittee and ruling elders shall give me a decent funeral
 monument not to exceed £100 sterling, and then the widow
 and the orphan and neglected children to be seen after by the
 minister, comittee, and ruling elders, having suceding au-
 thority to remember the poor of the church at Chrismass
 every year. . . ."

The codicil was as follows: "I will appoint Fredrick Her-
 bert Thompson and Abrem Dent. . . the exeters and
 trustees of my last will above ritten and I hereby vest all my
 property in them as trustees for the purposes mentioned in
 said will."

Two questions were presented: (1) Whether the benefi-
 ciaries named in the will and codicil were sufficiently desig-
 nated or definite. (2) Whether the devises and bequests
 were invalid under the Mortmain and Charitable Uses Act,
 1902—the testator having died less than six months after the
 making of the said will and codicil.

H. W. Mickle, for the executors.

E. D. Armour, K.C., for the Presbyterian congregation of
 Tamlight O'Crilly.

A. W. Holmested, for the next of kin of the testator.

MACMAHON, J.—The general charitable intent of the tes-
 tator is manifest from the whole tenor of the will. The
 devises and bequests in the will are to the members of the
 Presbyterian congregation, those particularly designated as
 beneficiaries being "the widows and neglected children and
 the poor," and the minister, the committee, and elders of the
 church being the almoners named in the will for the purpose
 of carrying the testator's charitable design into effect.

The Mortmain and Charitable Uses Act, 2 Edw. VII. ch. 2,
 sec. 6, provides that "the following shall be deemed to be
 valid charitable uses within the meaning of this Act, viz,
 the relief of aged, impotent, and poor people . . . the
 support, aid, and help of persons in poor circumstances
 . . . and any other purposes similar to those hereinbefore
 mentioned."

The beneficiaries are, I consider, sufficiently designated and come within the meaning of the above 6th clause of the Act of 1902. And if so, the gifts being charitable gifts, the rule against perpetuities does not apply to them. In *Goodman v. Mayor of Saltash*, 7 App. Cas. at p. 642, Lord Selborne. L.C., said: "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or any particular class of such inhabitants (as I understand the law), is a charitable trust; and no charitable trust can be void on the ground of perpetuity." See also *Attorney-General v. Comber*, 2 S. & S. 93; *Attorney-General v. Clarke*, Amb. 422.

Then, dealing with the second question submitted, as to whether the devises and bequests are invalid by reason of the provisions of the Mortmain and Charitable Uses Act, 1902, the testator having died less than six months after the making of the said will and codicil.

The Act relating to Mortmain and Charitable Uses, R. S. O. 1897 ch. 112, sec. 4, provides that "land may be devised by will to or for the benefit of any charitable use," etc.

There is nothing in this Act making a devise of land in favour of a charity invalid unless the will was executed not less than six months before the death of the testator.

By the Mortmain Act of 1902 (2 Edw. VII. ch. 2) it is provided (sec. 1) that the Act shall be read as part of the Mortmain and Charitable Uses Act, R. S. O. ch. 112. And by sec. 2, sub-sec. 1, of the former Act "assurance" includes a devise, bequest, and every other assurance by deed, will, or other instrument.

And sec. 7 (1) provides that "subject to the provisions of the Revised Statutes, chapter 112, and to the savings and exceptions contained in this Act . . . every assurance of land to, or for the benefit of, any charitable uses, and every assurance of personal estate to be laid out in the purchase of land, to, or for the benefit of, any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void."

Counsel for the heirs at law of the testator relied on sub-sec. 6 as rendering invalid the devises and bequests in favour of the charities by reason of the testator having died within six months of the making of the will. That sub-section reads as follows:

"If the assurance is of land, or of personal estate, not being stock in the public funds, then, unless it is made in good faith for full and valuable consideration, it must be made at least six months before the death of the assurer, in-

cluding in these six months the days of the making of the assurance and of the death."

That section refers to the case of a deed, as the "assurance" there referred to is required to be made "for full and valuable consideration," which cannot have any application to a will.

Section 4 of ch. 112, R. S. O., as to devises of land by will for charitable uses, therefore remains untouched, and a devise under that section in favour of a charity would be good if made on the very day of the testator's death.

There will be a declaration that, according to the true construction of the will and codicil, the trusts created and the beneficiaries named in the will and codicil are sufficiently defined and designated; and that the devise by the testator of his real estate and the bequest of his personal estate by the said will are valid.

The costs of all parties will be paid out of the estate, those of the executors as between solicitor and client.

MEREDITH, C.J.

OCTOBER 22ND, 1903.

WEEKLY COURT.

BOULTON v. BOULTON.

Indemnity—Enforcement of Mortgage—Judgment—Damages—Expenses—Loss by Sale of Goods by Sheriff—Costs—Travelling Expenses—Interpleader Order—Approximate Consequences of Acts.

Appeal by defendants from report of local Master at Belleville upon a reference to take an account of the loss, costs, and damages sustained by plaintiff because of a certain mortgage called the Biggar mortgage. This mortgage, though paid off by the defendant Paul A. Boulton, had been assigned by the mortgagees to the defendant Hiram A. Boulton, who claimed to be entitled beneficially, and who at the time the action was begun was endeavouring to enforce the mortgage against the plaintiff and her property.

The action was brought to restrain proceedings on a judgment recovered on the Biggar mortgage, for a declaration that that mortgage was, as against plaintiff, paid off and satis-

fied, and for an account and payment of the loss, costs, and damages sustained or paid by plaintiff by reason of the Biggar mortgage.

An interim injunction was granted by the local Judge at Belleville restraining the sale of the plaintiff's goods under the execution issued upon the Biggar judgment; and upon a motion to continue the injunction coming on to be heard, an order was made on the 14th April, 1896, directing that the parties should proceed to the trial of an issue for the determination of the matters in question between them, and providing for staying the sale of the goods seized under the execution on condition that the plaintiff should deposit with the sheriff by a time named \$400, "to represent the value of the goods seized," with liberty to her within a week to substitute a sufficient bond for \$400, upon the doing of which she was to be at liberty to "withdraw from the custody of the sheriff" the \$400, and it was by the order further provided that the plaintiff should pay the sheriff's expenses in connection with the seizure.

The plaintiff paid \$400 to the sheriff or into Court, and paid the expenses of the sheriff, as directed by the order.

Instead of proceeding to the trial of an issue, as directed by the order, by arrangement between the parties pleadings were delivered and the action proceeded to trial and was tried before Rose, J., on the 5th November, 1896.

A further question was raised by the pleadings, as to whether the goods seized by the sheriff were the property of the plaintiff or of her husband, against whom the Biggar judgment had been recovered, and who, it was not disputed, was liable to pay it.

By the judgment pronounced at the trial it was adjudged that the goods seized were the property of the plaintiff's husband, and it was ordered that the sheriff should proceed to sell them under the execution on the Biggar judgment, and that the \$400 paid into Court by the respondent under the order of the 14th April, 1896, should be retained by the sheriff "to answer any depreciation in the value of the goods seized or other loss by reason of the postponement of the sale," on the application of the plaintiff.

The goods seized were sold pursuant to the directions contained in the judgment, and realized \$274.76.

Upon appeal from the judgment pronounced at the trial, it was reversed as to the adjudication against the claim of the plaintiff to the goods seized, and it was adjudged that they were the property of the plaintiff as against the defendants, and it was ordered that the proceeds of the sale of the goods, as well as the \$400 paid into Court, should be paid out to the plaintiff.

Upon the reference before the local Master, the plaintiff brought in her claim under four heads:—

1. The expenses which she was put to in raising the \$400 paid into Court.

2. The loss sustained by the sale of the goods by the sheriff, the goods not having brought, as she alleged, their full value, owing to the sale being a forced one.

3. The costs between solicitor and client of the action.

4. Her travelling expenses disbursed in connection with the litigation.

All of these claims were allowed, though considerably less than the plaintiff sought to recover was allowed by the learned local Master.

R. C. Clute, K.C., for the defendants, contended that none of the claims should have been allowed; that the costs awarded to the plaintiff in the various Courts were the only indemnity to which she was entitled in respect of the costs of the litigation; and that in respect of the seizure and sale of the goods under the execution, the case was to be dealt with on the footing of a seizure at the instance of the defendants of the goods as being the goods of the plaintiff's husband; and that whatever liability they may have incurred for the wrongful seizure and sale, the loss to the plaintiff was not one coming within the terms of the contract of indemnity and therefore not within those of the reference.

F. E. O'Flynn, Belleville, for plaintiff.

MEREDITH, C.J.—I am of opinion that plaintiff was not entitled to the amounts allowed to her for loss and damage in respect of the seizure and sale of the goods.

If the goods had been seized as being the goods of plaintiff's husband, the contention of the appellants would, I think, have been entitled to prevail. They were, however, seized under an execution against the goods of plaintiff, as

well as of her husband, and the question of the ownership of them was unimportant unless the plaintiff should establish that the judgment debt was as against her satisfied. That, however, does not assist plaintiff, as everything that was done after the seizure (for which nothing has been allowed) was done under the authority of the order of the 14th April, 1896, and the judgment pronounced at the trial; and if (as is well settled) an execution creditor is not liable for any loss which is sustained by one whose goods are wrongfully seized as being the property of the execution debtor, which happens after the making of an interpleader order, I am unable to see how the defendant Paul A. Boulton is liable for any damage which plaintiff suffered owing to anything that was done under the order and judgment. . . .

[Walker v. Odling, 1 H. & C. 621, and Mayne on Damages, 7th ed., p. 439, referred to.]

What in this case was done under the order of 14th April, 1896, and the judgment pronounced at the trial, was not, I think, the approximate consequence of the efforts of defendants to enforce the Biggar judgment against the plaintiff, and the seizure of her goods under the execution issued upon that judgment.

What was paid to the sheriff for his expenses is, to the extent of what was incurred before the date of the order, properly allowable, as that was the direct consequence of the wrongful enforcing of the execution against plaintiff's goods. . . .

I am unable to agree with the argument of defendants' counsel as to classes 1 and 2.

Had the act which caused the damage to plaintiff been that of some one other than the defendants, for which defendant Paul A. Boulton was liable on the contract of indemnity, it is not open to doubt that he would have been liable to indemnify the plaintiff against the costs properly incurred, between solicitor and client as well as between party and party: Mayne on Damages, 7th ed., p. 94: and I see no reason why, where the act is that of the very person who has agreed to indemnify her, the plaintiff should be in a worse position.

All the costs of the action were not, however, incurred in resisting the attempt to enforce the Biggar mortgage against plaintiff and in obtaining relief against it. The action was brought also to recover damages for breach of the contract to indemnify, and to the costs of such action the contract of indemnity does not, of course, extend.

The learned Master, therefore, I think, erred in allowing all the costs between solicitor and client incurred in the action. They should have been apportioned so as not to charge the defendants with so much of them as were properly referable to enforcing the claim for indemnity. . . .

The amount to be allowed to plaintiff for journeys in connection with the litigation must be dealt with in the same way, and of course all journeys in connection with the payment of the \$400 into Court or the sale of the goods must be disallowed, applying the same principle upon which I have held that the items forming classes 1 and 2 are to be dealt with.

There will be no costs of the appeal to either party.

TEETZEL, J.

OCTOBER 23RD, 1903.

RE BAILEY.

CHAMBERS.

Will—Construction — “Money” — Residuary Personal Property — Pecuniary Legacies — Insufficiency of Personal Estate for—Resort to Residuary Real Estate—Devise of Land—Mortgage—Execution.

Application by executors for order declaring construction of will of John Bailey and giving directions as to the distribution of his estate; also on application by John Sidney Bailey, one of the devisees, for an administration order. The testator had four sons and five daughters. To each son he devised a farm with specific description, and also bequeathed them legacies, viz.; to Edward, \$1,000 either in money or stock; to Henry, \$2,000 either in money or stock; to Robert, \$1,000 either in money or stock, and sufficient seed and feed; to John Sidney, all the chattels and implements upon the farm devised to him. To each daughter he bequeathed \$2,000. He then made the following provisions as to the residue: “6. I give to my wife all the money that remains after paying my former bequests, debts, and funeral expenses, and a family monument to cost not less than \$500. . . . and all that may accrue from the farm during her term of management to dispose as she pleases, but if she should die without disposing, then I order that the undisposed part be equally divided amongst my sons and daughters

then living. 7. I order my executors to sell my undisposed real estate and divide equally amongst my children then living."

G. H. Watson, K.C., for the executors.

D. W. Dumble, K.C., for the pecuniary legatees.

G. Wilkie, for John Sidney Bailey.

TEETZEL, J., held, that the term money in clause 6 was intended by the testator to embrace his entire residuary personal property. See *Jarman on Wills*, 5th ed., p. 725; *Am. & Eng. Encyc. of Law*, 1st ed., vol. 15, p. 702.

The personal estate not being sufficient, after payment of debts, to satisfy the pecuniary legacies, the residuary real estate should not be used to supplement the personal estate in satisfying the pecuniary legacies; the testator did not intend that his real and personal estates should be regarded as one mass, but he treated them as two distinct masses. *Greville v. Brown*, 7 H. L. C. 689, distinguished. *Wells v. Row*, 48 L. J. Ch. 476, *James v. Jones*, L. R. 9 Ir. 489, *Gyett v. Williams*, 2 J. & H. 429, *Re Bailey*, 12 Ch. D. 268, and *Totten v. Totten*, 20 O. R. 505, referred to.

The executors were not called upon to pay out of the personal estate, as part of the debts of the deceased, a mortgage of \$900 on the farm devised to John Sidney Bailey, there being nothing in the will to shew an intention of the testator to relieve the devise from the mortgage.

Usual administration order to go unless the parties otherwise agree. Costs of all parties of the executors' application to be paid out of the estate.

MEREDITH. J.

OCTOBER 23RD, 1903.

THORP v. WALKERTON BINDER TWINE CO.

Venue—Change of—County Court Action — Witnesses — Expense.

Appeal by plaintiff from order of Master in Chambers, ante 845, changing the venue from Guelph to Walkerton,

upon defendants undertaking to pay all the additional expense properly arising from the change to the plaintiff.

J. J. Drew, Guelph, for plaintiff.

G. H. Kilmer, for defendants.

MEREDITH, J., allowed the appeal and restored the venue to Guelph. Costs in the cause.

CARTWRIGHT, MASTER.

OCTOBER 24TH, 1903.

CHAMBERS.

BOLSTER v. BOOTH.

Judgment—Amendment—Ex Parte Application—Changing Personal into Proprietary Judgment—Rescission of Order Giving Leave to Amend.

Motion by the defendants to rescind an order made by the Master in Chambers, on the ex parte application of plaintiff, on 19th March, 1903, allowing plaintiff to amend the writ of summons and statement of claim nunc pro tunc, and without service upon defendants, by alleging thereon that one of the defendants was a married woman and had separate estate at the time she entered into the covenant sued on, and by claiming judgment against her separate estate, and also allowing plaintiff to amend the judgment so as to make it a judgment against her separate estate.

The covenant was contained in a mortgage deed dated on the 1st June, 1892. The action was begun on 10th November, 1902. Defendants filed a statement of defence on 5th December, 1902. Shortly afterwards an order was made striking out the defence and permitting plaintiff to sign judgment against defendants for the amount due upon the covenant. There was no reference in any of the proceedings to separate estate. Defendants were husband and wife.

The order for amendment first came to the knowledge of defendants on 27th April, 1903, and this motion was launched on 6th May, 1903.

A. W. Ballantyne, for defendants.

W. R. Smyth, for plaintiff.

THE MASTER.—. . . Gordon v. Warren, 24 A. R. 44, and other cases cited, would be very instructive in a discussion as to whether Mrs. Booth had or had not separate estate on 1st June, 1892. At present, however, the only point for decision is, whether the ex parte order was rightly made. I am obliged to hold that it was not. From the writ itself it appears that service was accepted by the solicitors for the defendants. Upon them, therefore, service of the amended writ and statement of claim could easily have been made. Very possibly no opposition would have been made to the judgment being amended as has been done. But, however that may be, I think that the defendant Mrs. Booth should have had an opportunity of deciding what course she would take in the matter. In Howland v. Dominion Bank, 15 P. R. 56 (approved and followed in Cairns v. Airth, 16 P. R. 100, at p. 104), it is laid down that on such applications as the present the existing state of things may be looked at and new evidence adduced to support or repel the motion. On the present motion the new material is the affidavit of Mrs. Booth negating the possession of separate estate at the time of the execution of the mortgage and the affidavit of defendants' solicitor. . . . The order must be set aside with costs, to be set off against the costs payable by defendant Mrs. Booth under the judgment in the action.

I cannot but think that an ex parte order to amend a judgment should only be made in respect of a clerical error or some defect of that character. . . .

CARTWRIGHT, MASTER.

OCTOBER 24TH, 1903.

CHAMBERS.

ROBINSON v. TRUSTEES OF TORONTO GENERAL
BURYING GROUNDS.

Pleading—Statement of Claim—Damages—Breach of Covenant—Necessary Allegations—Particulars.

The statement of claim set out that plaintiff purchased from defendants and defendants conveyed to her a plot in a cemetery, wherein she buried her husband; that the rules, by-laws, and regulations of defendants were taken to be incorporated in their deeds; that by the rules of defendants it was enacted that no grave should be opened nearer than six inches from the boundary line of a plot; that plaintiff,

with permission of defendants, interred her husband's body in the said plot; (para. 6) that defendants, wrongfully and in breach of the terms and provisions of their deeds, opened the grave within six inches from the boundary line. By the 3rd paragraph of the prayer for relief plaintiff asked damages for breach of the provisions and covenants in said indentures of conveyance of said plot, etc.

The defendants moved to strike out the 4th, 5th, and 6th paragraphs and the 3rd paragraph of the prayer, upon the ground that there was no allegation of any covenant by defendants to comply with the regulations, or for particulars of such paragraphs.

W. Davidson, for defendants.

J. H. Milne, for plaintiff.

THE MASTER.—I think the motion should prevail, and that defendants are entitled to know what are the covenants, if any, which they are charged with violating and in respect of which damages are claimed.

If plaintiff so elect, the claim for damages might be abandoned, and that might suffice. But the plaintiff must be left to amend as advised. . . .

[Phillips v. Phillips, 4 Q. B. D. 131, referred to.]

If the plaintiff intends to pursue the claim for damages for breach of the provisions and covenants, as set forth in the 6th paragraph, such covenant should have been stated in that paragraph, and would have to be proved at the trial. But that paragraph is defective in not stating any such covenants, or by not containing an allegation that defendants were bound to conform to their own regulations and had covenanted so to be bound. . . . In the present state of the claim they cannot say what is the ground of the attack. . . .

Order requiring plaintiff to amend. Costs to defendants in the cause.

TEETZEL, J.

OCTOBER 24TH, 1903.

TRIAL.

KILLENS v. WAFFLE.

Deed—Action to Set aside Conveyance of Land—Undue Influence—Mental Incapacity—Imprudence—Delay in Bringing Action—Costs.

Action by one of the next of kin of Eliza Hunt, deceased, to set aside a conveyance made by her on 14th June, 1895,

conveying all her property to defendant Waffle, in consideration of an agreement by Waffle to maintain her during her life, and providing that in case of refusal or neglect on his part to carry out the agreement he should pay her \$25 per annum. The agreement was made a charge upon other property of defendant.

At the time she executed the conveyance deceased was about seventy. Some months before that the house upon her farm had been burned, leaving her without a home. Her children, who lived a long distance away, were communicated with, but did not seem disposed to put themselves about to look after their mother.

The defendant Waffle was a nephew of the deceased, and lived a few miles from her farm. From the time of the execution of the deed and agreement she continued to live with Waffle until she died in March, 1897; and the defendant paid her debts, comfortably maintained her during her life, and provided her with decent burial.

R. T. Walkem, K.C., for plaintiff.

J. L. Whiting, K.C., for defendants Waffle and Noonan.

W. A. Lewis, Brockville, for defendants the Foleys.

J. B. Walkem, Kingston, for the infant defendant.

TEETZEL, J.—I find as a fact that the property conveyed by the deceased to the defendant Waffle, which consisted of some chattel property of trifling value and an equity in the farm in question, did not exceed in net value the sum of \$800, after payment of the debts and incumbrances.

I also find that the agreement and conveyance were brought about at the solicitation of the deceased; that she was not unduly influenced in any way by defendant Waffle; that there was no fiduciary relationship existing between them; that a solicitor . . . was called in by defendant Waffle to prepare the agreement; and that he was in conference with the deceased for at least half an hour before the agreement was prepared.

I also find that, while the memory of the deceased had been somewhat impaired by age and disease, she was possessed of sufficient mind, memory, and understanding to appreciate the transaction.

I also find that . . . the transaction was not improvident.

The action was not brought until 30th September, 1902, over seven years from the date of the deed, and, while the delay may not be in itself an absolute bar, I think it is a fact proper to be considered in determining the case; but in view of my findings on the merits of the case, it is not necessary to determine whether plaintiff is estopped by delay and acquiescence.

The action will be dismissed with costs as against the defendant Waffle, and without costs as against the defendant Noonan, a purchaser of the farm in question from his co-defendant, but who unnecessarily encouraged plaintiff to bring the action.

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(TO AND INCLUDING OCTOBER 31ST, 1903.)

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STREET, J.

OCTOBER 26TH, 1903.

CHAMBERS.

RE FOSTER.

*Will — Construction — Devises of Land — Charge of Debts —
Mortgage Debts — Apportionment — Valuation — Costs.*

Further evidence was adduced and further argument heard in this matter after the judgment reported ante 212. The same counsel appeared.

STREET, J.—Referring to my judgment in this matter of last March, evidence has now been adduced fixing the value of the west quarter of lot 35 in the 3rd concession R. F. Nepean at \$3,100, and that of the north half of lot 34 in the same concession at \$5,000.

The last mentioned lot is, however, subject to a mortgage of \$700 or \$800 in addition to the subsequent charge of \$2,700 upon both lots. Under the authorities the amount of the mortgage with which the north half of 34 is solely chargeable should be deducted from the \$5,000 at which the land is valued, for the purpose of computing the proportion which that lot should bear of the \$2,700 mortgage, and the other debts, if any, of the testator. The total amount of the \$2,700 mortgage and the other debts, if any, are to be divided between the two parcels in the proportion of 3,100 to 5,000, minus the amount of the \$700 or \$800 mortgage.

It was argued that there should be a further deduction from the \$5,000 of the value of the rights given to the sisters of the devisee by the testator and charged upon the north half of 34 by the will. I can not find any authority for this contention, and it seems contrary to principle. The theory of Locke-King's Act is, that the testator intended to give to the devisee only his equity of redemption in the land devised. Any charges which the testator creates by his will are charges upon the equity of redemption devised, and must be taken to

have been intended by the testator as sums which the devisee taking the equity of redemption must pay out of it.

Most of the adult parties have signed a consent that, for the purpose of estimating the proportion of the \$2,700 mortgage which the north half of 34 should bear, its value is to be taken at \$3,000. This may well hold good as far as the adults consenting to it are concerned, but the interests of the infants must be calculated upon the basis I have indicated.

The costs of the proceedings since my former judgment, including the argument on the 19th instant, should be dealt with as part of the costs dealt with in my former judgment.

CARTWRIGHT, MASTER.

OCTOBER 19TH, 1903.

FERGUSON, J.

OCTOBER 26TH, 1903.

CHAMBERS.

STOCK v. DRESDEN SUGAR CO. .

Security for Costs—Plaintiff out of Jurisdiction—Assets in Hands of Defendant—Admissions—Letter ante Litem.

Motion by plaintiff to set aside an order for security for costs.

The plaintiff was employed by the defendants for something over a year at a salary of \$5,000, payable in monthly instalments at the end of each month. He was paid to the end of March, 1903, and sued for \$1,103.90, which he claimed as due to the 19th June, 1903, and interest.

The plaintiff resided out of the jurisdiction.

D. L. McCarthy, for plaintiff.

George Wilkie, for defendants.

THE MASTER.—The plaintiff relies on a letter dated 18th June, 1903, written by Davidson, president of the defendant company. The purport of the letter is that plaintiff had spent much time away on his own account, and therefore (says the writer) "it would not be right to expect our company to pay you your wages when you were off on your own business and pleasure." A little further on the writer says: "When I was in Dresden I instructed Mr. Elsey (the company's manager) to figure up the time and also made out a cheque for the balance due you on account of the contract, deducting only for such time as you were away from Dresden on your own business and pleasure. Mr. Elsey still has that cheque and also a receipt for you to sign, which will be delivered to you on application to Mr. Elsey." After a certain

amount of repetition of the foregoing, the letter concludes as follows:—"If you desire to get the matter settled up, you can call on Mr. Elsey and get the cheque in question and sign the receipt, and thereby get the matter cleaned up."

The foregoing seems to be an unqualified admission of a "balance due" the plaintiff, which the other affidavits shew to be over \$400. Mr. McCarthy relies on this as bringing the case within the principle of *Duffy v. Donovan*, 14 P. R. 159, and *Thibaudeau v. Herbert*, 16 P. R. 420. The letter was written on the 18th June last, and the plaintiff's solicitor positively asserts in his affidavit that the writer made the same admission in July. The solicitor has not been cross-examined. And Mr. Davidson and Mr. Elsey are not very positive in their denial of the admissions alleged to have been made by them, while the letter itself is not stated to be without prejudice. Had anything of that sort appeared, it would have been a different matter. . . .

I think there is *prima facie* a sufficient admission of a substantial liability to the plaintiff. The letter of the 18th June was written "*ante litem motum*," and is of great weight on that account. . . .

After consideration of the whole material, I think the order for security should be set aside. The costs of this motion to be costs in the cause.

The defendants appealed.

The same counsel appeared.

FERGUSON, J., affirmed the Master's order.

MACMAHON, J.

OCTOBER 26TH, 1903.

WEEKLY COURT.

RE WATEROUS AND CITY OF BRANTFORD.

Municipal Corporations—By-law—Closing Highway—Private Interests—Notice—Publication—Compensation to Person Injured.

Motion by Julius E. Waterous for an order quashing by-law No. 770 of the corporation of the city of Brantford, authorizing the diversion of Jex street in that city, on the grounds: (1) That the by-law was passed not to subserve the interests of the public, but those of the Waterous Engine Works Company. (2) That the passing of the by-law was not a bona fide exercise of the powers of the corporation. (3) That the effect of the by-law was to cause damage and injury to the applicant, for the benefit of the company, and to discriminate against the company. (4) That the closing of the

OCTOBER 26TH, 1903.

C.A.

REX v. MENARD.

Criminal Law—Thefts—Evidence of Former Offence—Acquittal—Judge's Charge.

Motion on behalf of the prisoner under sec. 744 of the Criminal Code for leave to appeal. She was tried before MACMAHON, J., and a jury at the Ottawa Assizes on the 19th September, 1903, on a charge of having stolen a sum of money from the person of one Felix Lalonde on the 11th August, 1903, and was convicted. At the trial counsel for the prisoner objected that the learned Judge erred in permitting evidence to be given that the prisoner had on the 8th August stolen a sum of money from the same Felix Lalonde.

The trial Judge refused to state a special case, and so this motion was made.

E. Mahon, Ottawa, for the prisoner.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—It appears that earlier during the same assize the prisoner was tried on a charge of stealing \$16 from Lalonde on the 8th August. The defence was that the prosecutor lent the money to the prisoner, who was to repay it on the 11th August, and the prisoner was acquitted. At the second trial counsel for the Crown questioned Lalonde concerning what had taken place on the 8th August. It was necessary and proper to refer to that occasion in order to draw from Lalonde an explanation of his being in the prisoner's house on the 11th August. But it was not necessary to go further than to shew that his reason for going there was to receive back the money the prisoner had obtained from him on the 8th. There was no occasion for entering into the details further than to elicit testimony to that effect, and the Crown might properly have rested when it was shewn that it was arranged that Lalonde was to return on the 11th August. In the end the learned Judge put a stop to further questioning on the point, and he then pointed out that the jury at the former trial had found that the first transaction was a loan repayable on the 11th. And in charging the jury the learned Judge repeated that the other jury properly came to the conclusion that on the 8th the money was lent by Lalonde to the prisoner, and that she had agreed to return it on the 11th. The minds of the jury were thus freed from

any possible misapprehension as to the nature of the transaction on the 8th, and its real bearing on the occurrences of the 11th was explained. The prisoner admitted that Lalonde was to come to her house on the 11th August in order to receive payment of the \$16, but her defence was that he did not come and was not there at all on that day. This was the real issue which the jury had to determine, and it was fairly and properly presented to them by the learned Judge.

On the whole case we think that there was no miscarriage, and that we ought to refuse the application.

OCTOBER 26TH, 1903.

C.A.

REX v. BULLOCK.

Criminal Law—Evidence—Trial of same Prisoners on several Charges—Trial before Judge without Jury—Prejudice to Prisoners—Evidence—Cases not Kept Distinct.

Appeal by Bullock and Stevens, the prisoners, from convictions by the Judge of the County Court of Waterloo, in the County Judge's Criminal Court, on two separate charges of receiving stolen goods knowing them to have been stolen. The prisoners were acquitted on a third charge, of house-breaking and stealing.

The first charge was of having on the 9th November, 1902, received tobacco stolen from one James Johns. The second charge was of having on 23rd October, 1902, received three razors stolen from one Leonard A. Macdonald. And the third charge was of having on the 23rd October broken and entered the shop of Thomas Hamilton and stolen a quantity of ginger ale and lemon sour soda.

The trial took place on the 27th December. The accusations or indictments on which the prisoners were brought before the Judge were of breaking and entering the shops of the respective persons mentioned with intent to steal, but with the consent of the Judge the further charge of receiving was added in the first two cases.

After stating the evidence in the first case, that is, the tobacco case, the learned Judge made the following statement: "I find in my note book that at the close of the case for the Crown it is noted that I dismissed the charge of shop-breaking as charged in the first count, and found a prima facie case for receiving stolen tobacco, as charged in the second count, made out. The case was then adjourned to 30th December at 10 a.m. to let in evidence for the defence. This evidence consisted chiefly of evidence of relations and friends

of accused as to their character and habits, and shewed that they used tobacco. Evidence for defence made no change on my mind. I still found both prisoners guilty of receiving stolen goods knowing them to have been stolen. I remanded the prisoners for sentence until after the trial of the next case."

The case stated that the second charge, that of receiving razors, was tried on the 27th December also, whereupon, upon the same day, the Judge made up his mind to find both prisoners not guilty of shopbreaking, but guilty of receiving the stolen property knowing it to have been stolen, though he did not so express himself in open court at the time, and he remanded both prisoners for judgment and sentence.

On the 30th December both prisoners were tried on the third charge and acquitted.

On the 31st December the Judge sentenced both prisoners to 23 months' imprisonment on the first charge, and to the same term of imprisonment on the second charge, the second sentence to run concurrently with the first. These sentences were not passed until after the trial and dismissal of the prisoners on the third charge.

The Judge added to his certificate: "I came to my finding in the first case before hearing the second case, and I am not conscious that I was biassed in coming to my conclusion on the second case through the knowledge acquired in the hearing of the first and third cases." He also stated that no objection was taken by counsel to the adjournment or to his remanding the prisoner for judgment and sentence until all the cases were tried.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.

George F. Kelleher, for the prisoners, contended that the convictions were illegal because the Judge had mixed up the trial of the several cases in a manner calculated to prejudice the prisoners, and relied on *Hamilton v. Walker*, [1892] 2 Q. B. 25, 67 L. T. 200, 56 J. P. 583.

J. R. Cartwright, K.C., for the Crown.

MACLENNAN, J.A.—*Hamilton v. Walker* was a case in which the evidence in support of two different charges was necessarily nearly altogether the same. Here, however, the circumstances of the three charges were altogether different as to time and place, and the only identity was in the persons charged, and the principal witness was the same in all three or at all events in the first two.

There is some confusion in the Judge's statement. He appears to have heard the case for the prosecution only in the first case on the 27th, and postponed the defence until the 30th, and apparently he completed the trial of the second case on the 27th. It may be that this is an inaccuracy, and that the defence in both cases was heard on the 30th. But, however this may be, I think the case is not governed by *Hamilton v. Walker*, but rather by the later case of *Regina v. Fry*, 19 Cox C. C. 135, 78 L. T. 717, . . . I think we ought to accept the statement of the Judge that he came to his finding in the first case before hearing the second case, and that he is not conscious that he was biased in coming to his conclusion in the second case through the knowledge acquired in the hearing of the first and third cases. I think, too, as said by the Court in the *Fry* case, it was easy for the Judge to keep the cases distinct, having regard to the differences of time, place, and circumstances between them.

It seems proper to call attention to the observations of Wills, J., in delivering the judgment of the Court in that case as to the caution which ought to be observed in such cases (78 L. T. 717). . . .

Appeal dismissed.

OSLER, J.A., gave reasons in writing for the same conclusion, and referred to *Regina v. Sing*, 5 Can. Crim. Cas. 156, *Regina v. McBerney*, 3 Can. Crim. Cas. 339, and *Regina v. Justices of Staffordshire*, 23 J. P. 486, in addition to the cases cited above.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

OCTOBER 26TH. 1903.

C.A.

REX v. HARRON.

Criminal Law—Resisting Bailiff—Distress for Rent—Necessity for Proof of Rent in Arrear—Lawful Distress—Rescue before Impounding.

Crown case reserved. The prisoners were charged for that they did resist and wilfully obstruct Michael Dillon, bailiff of the 7th Division Court in the county of Kent, in the execution of a lawful distress warrant against the goods of the prisoner John Harron. This was found to have been done by locking Dillon in the barn and rescuing from him animals under seizure by locking the gates and preventing his removal from the said premises of the animals under distress. The prisoner John Harron was tenant of certain

lands of one Graham under a written demise. A warrant in the usual form from Graham to Dillon was proved, authorizing him to distrain for arrears of rent alleged to be due and owing under the lease; and the alleged offence consisted in the resistance to the distress and rescue of animals taken in the name of a distress under this warrant as above stated. There was no evidence that the distress had been impounded.

For the prisoners it was contended that in order to prove an offence under sec. 144 (2b) of the Code it was necessary for the Crown to shew that the rent was due and in arrear, or at least that the evidence tendered by the prisoners to prove that there was no rent in arrear at the time of the distress should have been admitted. The Judge ruled that proof that rent was due was foreign to the case, and that the warrant was conclusive as to the rent being due; if it was not due, the prisoners had their civil remedy.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

J. H. Moss, for prisoners.

J. R. Cartwright, K.C., for the Crown.

OSLER, J.A.—I am of opinion that the learned Judge's ruling was wrong on both points, and that the questions submitted should be answered in favour of the prisoners.

Section 144 (2b) of the Code enacts that "every one is guilty of an offence . . . who resists or wilfully obstructs any person in the lawful execution of any process against any land or goods, or in making any lawful distress or seizure.

The last branch of the sub-section is that under which, if at all, the indictment must be maintained, as a distress warrant for rent is not "process," the very definition of such a distress being a taking without legal process. It is of the essence of the statutory offence that the distress resisted should have been a lawful distress, and therefore, as the commission of an offence must be established against the accused before he can be convicted, it necessarily devolves upon the prosecution to prove the existence of all the ingredients which go to make it up, one of which, in the case of such a charge as the present, is the legality of the distress. If no rent is due and in arrear, it goes without saying that the distress is illegal, whatever may be the civil remedy open to the tenant. It seems, therefore, almost needless to say more than that, within the very words of the Act, if a lawful distress is not proved, the Crown has not established the commission of the offence mentioned in the sub-section. The whole

section draws a clear distinction between obstructing or resisting public and peace officers in the execution of their duties, or persons acting in the lawful execution of process, and a distress or seizure by a private person such as a landlord or his bailiff or agent.

It has always been lawful for a tenant, before the goods seized under a distress warrant have been impounded, to resist their seizure, or to rescue them if there was no rent due: *Bevil's Case*, Co. Rep. part IV., 11a; *Gilbert on Distress*, 4th ed. (1823), p. 61; *Bradby on Distress*, 2nd ed. (1828), pp. 193, 195; *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 9, p. 656, and cases there cited; *Rex v. Bradshaw*, 7 C. & P. 233, 236; *Regina v. Brennan*, 6 Cox C. C. 387; *Russell on Crimes*, vol. 1, p. 411.

The conviction must be quashed and the prisoners discharged. It is not a case for granting a new trial.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

OCTOBER 26TH, 1903.

C.A.

REX v. CARLISLE.

Constitutional Law—Ontario Liquor Act, 1902—Intra Vires—Conditional Operation—Proclamation of Lieutenant-Governor—Delegation of Legislative Power—Sec. 91 of Act—Prevention and Punishment of Corrupt Practices—Appointment of Judges to Try Offenders—Delegation—Trial by Jury—Conviction for Personation—Sentence—Penalty—Imprisonment—Jurisdiction—Place of Trial—Intitling of Conviction—Name of Informant—Date of Trial—Costs—Taxation—Warrant of Commitment.

An appeal by the prisoner from an order of BRITTON, J., dismissing a motion for discharge upon the return of a writ of habeas corpus.

The prisoner was charged with the offence of personation in connection with the vote taken under the Liquor Act, 1902, on the 4th December, 1902. The act charged was the applying to a deputy returning officer, at a polling place in the city of Toronto, for a ballot paper in the name of a person other than himself.

He was summoned at the instance of the County Crown Attorney for the county of York, and appeared before the Judge of the County Court of Ontario, who had been designated by the President of the High Court of Justice, under sec. 91 of

the Liquor Act, 1902, to conduct the trial of the prisoner and other persons accused of having committed offences in the city of Toronto. At the opening of the trial counsel for the prisoner objected that the Judge had not, either by virtue of the Liquor Act or in consequence of any proceedings had thereunder, acquired jurisdiction to try and convict the prisoner. The objection being overruled, the trial proceeded, and the Judge having heard the evidence found and adjudged that the prisoner had committed and was guilty of the corrupt practice of personation. He thereupon ordered and adjudged that the prisoner pay to the County Crown Attorney for the county of York the sum of \$400, the money penalty mentioned in sec. 167 (2) of the Ontario Election Act, and also the costs of the prosecution, which he directed to be taxed by one of the taxing officers of the High Court of Justice. He further directed that if the said sum of \$400 and the amount of the costs so to be taxed were not paid within thirty days from the 19th February, 1903, the prisoner should be imprisoned in the common gaol of the county of York for three months without hard labour, unless the said sum and costs were sooner paid. And he also adjudged that the prisoner for his said offence be imprisoned in the common gaol of the county of York without hard labour for the term of one year.

Under a warrant dated the 20th February, 1903, addressed to the sheriff of the county of York and others and to the keeper of the common gaol of the county, and directing the commitment of the prisoner, he was taken to and confined in the county gaol. The warrant recited that the time appointed by the order of the Judge for the payment of the said several sums of money had elapsed and that the prisoner had not paid the same or any part thereof, but had made default. This was a manifestly erroneous statement, for the thirty days for payment only commenced to run from the 19th February, and the amount of the costs had not even been ascertained or settled by taxation or otherwise.

The application for the prisoner's discharge was based on numerous exceptions to the proceedings. Included in them were objections to the validity of the Liquor Act, 1902, and in consequence thereof the Court directed notice of the argument to be given to the Attorney-General for the Dominion, who, however, intimated that he did not desire to be heard.

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

W. J. Tremear, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

Moss, C.J.O.—The exceptions taken to the validity of the Act may be shortly stated as follows: (1) The coming into effect of any part of the Act is made dependent upon the result of the vote directed to be taken. (2) In any event the coming into force of the second part of the Act is made dependent upon the result of the vote, and in both or either of these cases there has been an improper delegation by the Legislature of its power of enacting laws, to a body incapable of exercising the functions of proclaiming a law on its behalf; and, finally, the Legislature does not possess the power assumed to be exercised in sec. 91 of the Act of 1902 of appointing a tribunal to exercise the jurisdiction of a Court or of a delegating to the President of the High Court the power to designate such a tribunal.

The Act received the assent of the Lieutenant-Governor on the 17th March, 1902. That the subject-matter is one with regard to which the Legislature is competent to enact a law or laws, must be taken to be definitely settled by the judgment of the Judicial Committee in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A. C. 348, and *Attorney-General for Manitoba v. Manitoba Licenseholders' Association*, [1902] A. C. 73. The question is, did the Legislature in enacting the Act in its present form exceed, or fail to properly exercise, its powers?

The Act is in two parts. In part I. it is enacted that "there shall be submitted to the vote of the electors hereinafter declared entitled to vote thereon the following question: 'Are you in favour of bringing into force the Liquor Act, 1902?'" (2) The voting shall take place upon the said question in all the electoral districts in the Province on the 4th day of December in the year 1902, being the first Thursday in the said month."

Then follow elaborate provisions concerning the qualification of voters, the appointment of returning officers, the opening and holding of the polls and the taking of the vote, the preservation of peace, the maintenance of secrecy, the prevention of corrupt practices, the return of results, and the final summing up of the votes. Then it is enacted (sec. 104) that in case it appears from the summary that a majority of the votes on the said question are in the affirmative and that the number of votes on the question in the affirmative exceeds one-half of the number of votes to be ascertained as specified, the Lieutenant-Governor shall issue his proclamation declaring part II. of the Act to be in force on, from, and after the 1st day of May, 1904, and part II. shall come into force and take effect on, from, and after the said date accordingly.

Now, while the effect of these provisions is that until the issue of a proclamation by the Lieutenant-Governor, which he can only issue upon the happening of a certain event, the coming into force and taking effect of part II. is suspended, there is nothing in them or in any other provision of the Act that we can discover to suspend the operation of the rest of the Act or to render its coming into force conditional upon any future act or event. Except as provided in sec. 104. there is no later date for the commencement of the Act or any part of it, and as regards part I. the provision of the Interpretation Act, sec. 6 (2), that the date of the assent shall be the date of the commencement, governs. All the provisions of part I. have, therefore, been in force since 17th March, 1902. and, as regards it, the aid of a vote of the electors or the issue of a proclamation was not required to bring it into force. All the provisions for the submission of the question and the ascertainment of the result of the voting, upon which depended the question whether the other part of the Act should come into force, became operative upon assent to the Act. The assent given applies to every part of the Act, but the taking effect of a part is made conditional upon the happening of some subsequent event.

Legislation which provides a law but leaves the time and manner of its taking effect to be determined by the vote of the electors, is not a delegation of legislative power to them. The subject-matter being, as before pointed out, within the competence of the Legislature, it has provided the whole legislation, and what remains partakes in no sense of the nature of legislation. It is only necessary to quote the language of Sir Montague E. Smith, in delivering the opinion of the Judicial Committee in *Russell v. The Queen*, 7 App. Cas. 829, at p. 835. . . .

There is no substantial distinction between these cases and the present. By the legislation which was under discussion in *The Queen v. Burah*, 3 App. Cas. 889, much larger powers were left to be exercised by the Governor and much wider discretion was vested in him than are here conferred upon the electors. But their Lordships rejected the argument that there was a delegation of legislative functions, observing (p. 906): "Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships' judgment) be well exercised either absolutely or conditionally. Legislation conditional on the use of particular powers or on the exercise of a limited discretion intrusted by the Legislature to persons in whom it places confidence, is no

uncommon thing; and in many circumstances it may be highly convenient."

In *City of Fredericton v. The Queen*, 3 S. C. R. 505, Ritchie, C.J. of Canada (to whose opinion reference is made by Sir Montague E. Smith in *Russell v. The Queen*), adopts the statement in *Cooley on Limitations*, 4th ed., p. 142, that "it is not always essential that a legislative act should be a complete statute which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event." This statement of the doctrine covers the present case.

There remains the objection that the Legislature has exceeded its powers in sec. 91 of the Act.

This section is directed to the prevention and punishment of corrupt practices during the taking of the vote, and makes provision for the trial and punishment of offenders, and as, besides the question of ultra vires, other questions are raised with regard to its construction, operation, and effect, it is proper to quote at length the portions on which the questions turn.

By sub-sec. (1) it is declared that all the provisions of the Ontario Election Act and amendments thereto relating to the prevention and punishment of corrupt practices and other illegal acts at elections, and contained in secs. 159 to 170 inclusive, and in secs. 181 to 186 inclusive, and in secs. 190 to 196 inclusive, of the said Act and amendments thereto, shall mutatis mutandis apply to the taking of the vote. Sub-section (2) provides that the penalties imposed for a contravention of any of the provisions mentioned in the preceding sub-section, and thereby incorporated in this part, or for a contravention of any other provisions of this part, shall be recovered in the same manner as penalties for the like offences are recoverable under the Ontario Election Act, and the procedure therein shall be the same as nearly as may be as they (sic) would have been had the offence been committed at the election of a member to serve in the Legislative Assembly.

Sub-section (3): It shall be the duty of every county Crown attorney and of every district Crown attorney, upon receiving information that any offence has been committed under this Act, to take proceedings for the prosecution of the offender and the recovery of penalties by this Act imposed.

Sub-section (4): In case a county or district Crown attorney is informed or has reason to believe that any corrupt practice or other illegal act has been committed in his county or district in connection with the voting under this part, he

shall forthwith notify the President of the High Court at Toronto, who shall designate a Judge of a County or District Court, of a county or district other than that in which such offence was committed, to conduct the trial of the persons accused, and the procedure thereon shall be the same as nearly as may be as in the trial of illegal acts under sec. 188 of the Ontario Election Act and amendments thereto.

It is upon this last sub-section that the objection now under consideration chiefly turns. It is argued that the Legislature has therein assumed the power of the appointment of Judges. But there is no appointment of any person to the judicial office. There is not even the creation of a judicial office to which any person not holding the position of Judge of a County or District Court could be appointed.

Section 188 of the Ontario Election Act, which is incorporated in the Liquor Act, 1902, and made to apply *mutatis mutandis* to proceedings under it, provides a mode of trial of persons accused of offences thereunder, by the Judges or a Judge upon the rota or by a Judge of the High Court holding a sittings of the Court for the trial of civil or criminal causes. Instead of putting the trials of offenders under the Liquor Act, 1902, upon these Judges, sec. 91 imposes the duty upon persons holding the office of Judge of County or District Courts.

The Judge to be designated may not try cases arising in his own county or district. But there is nothing in the Act saying that he shall not conduct in his own county or district the trial of the cases for which he is designated.

Sub-section 2 of sec. 188 provides that the summons may be issued or returnable at any place in this Province, and so far as appears there is no reason why a summons against a person who committed an offence under the Liquor Act, 1902, in one county or district, might not be made returnable in another county or district. In the same way the Judge by whom the summons is issued may exercise jurisdiction at the place where the summons is returnable. The Legislature having the power to make laws regarding the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts both of civil and criminal jurisdiction, has deemed it proper to create a special tribunal for the trial of offences under the Liquor Act. The Judges exercise jurisdiction under this statutory commission, acting just as the election Judges act, outside of and distinct from the jurisdiction they exercise in their respective Courts. And the Legislature did not exceed its powers when, by sec. 91, it provided for the substitution of County or District Judges to conduct the trials of offenders under the Act.

and enabled them to exercise jurisdiction outside of their county or district.

The remark of Hagarty, C.J., in *Re Wilson v. McGuire*, 2 O. R. 118, at p. 124, is in point. . . .

The manner of designation, i.e., by the President of the High Court, is on the whole convenient, and involves no delegation of appointment to office, any more than would be the giving power of assigning to the Judges of the High Court their circuits or sittings in Court.

It was objected that, assuming the Judge to be well appointed, he had no power to deprive the prisoner of his right of trial by jury. But a person charged with having committed a corrupt practice or illegal act under the provisions of the Ontario Election Act cannot demand a jury as of right. Bv sub-sec. (4) of sec. 188, upon the return of the summons the Judge is required to investigate and dispose of the case in a summary manner, and he is given wide powers of adjournment from time to time and from place to place, altogether inconsistent with the notion of a trial by jury. It is true that sub-sec. (2) of sec. 169 provides for punishment in case of trial by jury, but these are in cases where the Election Court orders the person charged to be prosecuted before some other Court. These provisions do not seem to apply to trials under sec. 188.

It is also objected that the order of conviction is bad on a number of grounds. The most important is that the Judge has sentenced the prisoner to one year's imprisonment in addition to the payment of a penalty of \$400 and costs, whereas under sec. 91 the Judge's jurisdiction is limited to the imposition of the pecuniary penalty. It is argued that sub-secs. (2) and (3) of sec. 91 only provide for the punishment of persons accused by the infliction of a pecuniary penalty, and not by imprisonment, and that the jurisdiction of the Judges appointed and designated under sub-sec. (4) is confined to the conduct of the trial for the recovery of the pecuniary penalty. But a reference to some of the provisions of the Ontario Election Act which are incorporated in the Liquor Act will shew that the provisions of sub-secs. (2) and (3) of sec. 91, so far from being restrictions upon, are amplifications of, them. By sec. 167, a person found guilty of personation as therein defined shall incur a penalty of \$400, and shall also on conviction be imprisoned for a term of one year with or without hard labour. The punishment being thus prescribed, the procedure is found in sec. 188. By sub-sec. (7) the Judge, being satisfied that the person charged has committed the offence, shall adjudge that the said person

has committed the corrupt practice or illegal act, and shall order him to pay to the person at whose instance the summons was issued the amount of the money penalty. Sub-section (2) of sec. 91 of the Liquor Act refers to the money penalties here spoken of, when it provides that the penalties shall be recovered in the same manner as penalties for the like offence are recoverable under the Ontario Election Act. Provision is made for such recovery by sub-secs. (13), (14), and (16) of sec. 188, and by secs. 195 and 196. Sub-section (10) of sec. 188 provides that if any punishment in addition to or instead of a money penalty is by law assigned to the commission of any offence of which such person has been found guilty, the Judges shall sentence the person so found guilty to undergo such punishment, and shall give all necessary directions in respect thereto. The punishment of imprisonment is thus made to follow upon the adjudication of guilt, and is brought into play by the direction in sub-sec. (4) of sec. 91 of the Liquor Act, that the procedure on the trial shall be the same as nearly as may be as on the trial of illegal acts under sec. 188 of the Ontario Election Act.

Therefore, while sub-sec. (2) deals with the recovery of the money penalties, sub-sec. (4) covers the case of punishment by imprisonment, and confers the jurisdiction to award it. And sub-sec. (3) makes it the duty of the county Crown attorneys and district Crown attorneys to become the prosecutors and to take proceedings for the prosecution of the offender, involving the punishment by imprisonment, and also for the recovery of the money penalties by one or other of the modes prescribed for the recovery of such penalties.

The objection that the order of conviction does not shew on its face where the trial was held, and therefore does not shew jurisdiction, is disposed of by what has already been said as to the jurisdiction. The jurisdiction is to try at any place in Ontario, and it appears that the trial was held under the Act. The order shews that the offence was committed at the city of Toronto, and the prisoner is sentenced to be imprisoned in the common gaol of the county of York at the city of Toronto.

The fact that the order is intituled in the High Court of Justice is immaterial, and that objection fails. The objection that it does not shew the name of the informer also fails. The county Crown attorney of the county of York is clearly shewn to be the prosecutor. So as to the date, the trial proceeded on the day the order bears date, and a date seems to be material only when the time for conviction is limited by statute, and it is necessary that the date of the

conviction should bring it within that time when compared with the date alleged for the offence: Paley, 7th ed., p. 230.

The objection to the form of the detainer has no force.

The next objection is that, while the prisoner is ordered to pay the costs, they are not ascertained or fixed or stated in the order. But this question does not arise at the present time. The prisoner is in custody under an order for his imprisonment for one year. In addition to this, he is ordered to pay a penalty of \$400 and costs within thirty days, and in default to imprisonment for three months, unless sooner paid. But in an order such as this is, the part relating to the payment of the costs is readily separable from the other part, and the order stands good as regards the imprisonment for one year. As remarked by Street, J., in *Rex v. Forster*, 2 O. W. R. 312, there is no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. At the expiration of that period, the question of the prisoner's further detention will arise, and it may then prove difficult for the Crown to shew any warrant for it. No authority has been shewn to justify the reference to one of the taxing officers to tax or ascertain the amount of the costs. The ordinary rule is that the convicting justice should fix and insert the amount in the order, and the direction in sub-sec. (15) of sec. 188 of the Ontario Election Act that the costs shall be included with the penalty in the same order, points to that being the proper practice in this case.

This also disposes for the present of the objection that the warrant of commitment erroneously states that the time for payment of the penalty and costs had expired.

These are the objections appearing to have any substance, and they fail to support the application for the prisoner's release. The appeal must be dismissed and the prisoner remanded to custody. But the order to be drawn up will reserve to the prisoner the right to apply again for his discharge at the expiration of the year's imprisonment.

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

OSLER, J.A., dissented.

CARTWRIGHT, MASTER.

OCTOBER 27TH, 1903.

CHAMBERS.

HISCOCK v. McMILLAN.

Costs—Dismissal of Action for Seduction—Death of Plaintiff's Daughter—Discretion—Dismissal without Costs.

This action was brought by a father and daughter as joint plaintiffs for the alleged seduction of the daughter by the

defendant. The daughter was in very bad health and could not attend for examination for discovery. On application her name as a plaintiff was struck out, and an order was made for her examination *de bene esse* as a witness on her father's behalf. Before her examination could be taken, she died on the 8th instant.

The plaintiff thereupon wrote on the 13th instant to the defendant's solicitor that he thought it better to drop the action.

No arrangement was reached by the solicitors, and on the 21st instant a motion was made by the plaintiff for leave to discontinue the action without costs. This was argued along with a motion by the defendant to dismiss for want of prosecution.

F. J. Roche, for plaintiff.

E. H. Cleaver, Burlington, for defendant.

THE MASTER.—. . . Under all the facts of this case, it does not seem that the plaintiff's offer to have the action dismissed without costs is unreasonable. If this cannot be done, I would have to make the usual order allowing the plaintiff to go to trial at the next sittings at Milton. The plaintiff's counsel on the argument stated that there was some other evidence which they might have to give if the defendant forced on a trial. I cannot think that the interests of the defendant will be in any way advanced by this. In the circumstances of this case I think that justice will be done by dismissing the action without costs (including costs of these motions).

The defendant has denied the charges made against him on oath and has not been examined for discovery. So he has all the vindication he could obtain if the action went down to trial.

I refer to sec. 72 of the Judicature Act, and *Snelling v. Pulling*, 29 Ch. D. 85, as shewing that I have discretion as to the costs.

MACLAREN, J.A.

OCTOBER 27TH, 1903.

CHAMBERS.

ATKINSON v. PLIMPTON.

Writ of Summons—Service out of Jurisdiction—Order Permitting—Motion to Set aside—Action for Price of Goods Sold—Sale by Sample—Return of Goods—Copyright—Discretion as to Forum.

Appeal by defendants from order of Master in Chambers, ante 827. dismissing motion by defendants to set aside an

order allowing plaintiffs to issue a writ of summons for service on defendants at Liverpool, England, the writ issued pursuant thereto, the service thereof, and all subsequent proceedings.

J. T. Small, for defendants.

W. E. Middleton, for plaintiffs.

MACLAREN, J.A.—. . . It is urged that the contract was a sale by sample; that defendants had a right to inspect the goods on their arrival at Liverpool; and that the breach of contract, if any, was in defendants' refusal to accept at Liverpool. When ordering the goods defendants directed them to be shipped by Leyland line steamer from Boston, they paying freight. I can find nothing in the contract to take this case out of the general rule, that the property would pass to the purchaser on the delivery of the goods on board the vessel at Boston, and that an action would thereupon lie for goods sold and delivered. [Atkinson v. Bell, 8 B. & C. 277, Philpotts v. Evans, 5 M. & W. 475. and Scott v. Melady, 27 A. R. 193, distinguished.] The purchasers were, no doubt, entitled to inspect the goods before accepting. But even in case of a sale by sample, *prima facie* the place of delivery is the place for inspection: Perkins v. Bell, [1893] 1 Q. B. at p. 197. There is nothing in the contract in this case to dislodge this presumption. . . .

The affidavit on which the order for service was granted sufficiently disclosed the facts to comply with Rule 163, although it did not shew that defendants refused to receive the goods at Liverpool, but shipped them back to plaintiffs at Toronto, and that they were lying there at the time the affidavit was made, nor the facts regarding the English copyright of one of the pictures sold, and that the defendants had paid for all the goods which they retained. . . .

The Master properly exercised his discretion in favour of an Ontario action. [Lopes v. Chavarri, W. N. 1901, p. 115, distinguished.]

Appeal dismissed with costs to plaintiffs in any event.

FALCONBRIDGE, C.J.

OCTOBER 27TH, 1903.

TRIAL.

SINCLAIR v. MCNEIL.

Ejectment—Trust—Statute of Frauds—Title by Possession—Costs.

Action of ejectment tried at Goderich.

W. Proudfoot, K.C., and G. F. Blair, Brussels, for plaintiff.

J. P. Mabee, K.C., for defendant.

FALCONBRIDGE, C.J.—Plaintiff has failed to establish the trust set up in the statement of claim, and, even if there were evidence to support it, the Statute of Frauds would be an answer. Nor has plaintiff succeeded in proving the charges of fraud. Nor has she established title in John McNeil by length of possession. The defendant has the paper title, and it has not been successfully impugned. The non-production by defendant until the eve of the trial of certain important documents is not very satisfactorily explained; therefore no costs.

Action dismissed without costs.

CARTWRIGHT, MASTER.

OCTOBER 28TH, 1903.

CHAMBERS.

**SASKATCHEWAN LAND AND HOMESTEAD CO. v.
MOORE.**

*Pleading—Defence—Action Brought in Name of Company—
Questioning Right to Use Name—Practice—Motion to
Stay Proceedings.*

After an order made in this case on the 14th October, 1903 (similar to that in the case of Saskatchewan Land and Homestead Co. v. Leadley, ante 850) the defendant amended his statement of defence by striking out paragraphs 9, 10, 11, and 13, and by adding 16 new paragraphs.

The plaintiffs moved to strike out the added paragraphs as being a repetition of those previously struck out.

J. J. Maclellan, for plaintiffs.

W. H. Blake, K.C., for defendant.

THE MASTER.— . . . The new paragraphs are only an amplification of those which defendant submitted to have struck out. They go very fully into the details of the alleged irregularities and illegal acts of those who are bringing this action, and ask a declaration that the proceedings of 14th July were illegal and void. I am still of opinion that, so far as this action is concerned, the cases cited on the previous motion apply.

[Reference to Austin Mining Co. v. Gemmell, 10 O. R. 696; Weaymouth v. Town of Barrie, 15 P. R. 95; and Barrie Public School Board v. Town of Barrie, 19 P. R. 33.]

The paragraphs complained of should be struck out with costs to plaintiffs in any event.

CARTWRIGHT, MASTER.

OCTOBER 28TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO v.
LEADLEY.*Pleading — Defence and Counterclaim — Action Brought in
Name of Company—Illegal Proceedings—Directors.*

The defendants other than John T. Moore submitted to the order reported ante 850. Defendant John T. Moore amended his defence by striking out the 9th paragraph and adding 16 others. By para. 9 he set out that on 30th June last he was, and still is, a shareholder in the said company. Para. 10 stated his appointment on 30th March, 1898, as director. Then para. 11 took up the proceedings in June last, and after setting them all out very fully and alleging numerous irregular and illegal acts on the part of those who were the substantial plaintiffs, asked on behalf of himself and all other shareholders in the same interest, by way of counterclaim, a declaration that the whole proceedings of 14th July, 1903, were illegal and void, including the election of directors.

Plaintiffs moved to strike out the new paragraphs, on the grounds that by the former order the matter was res judicata, and that this was not a proper ground of counterclaim and was embarrassing.

J. J. MacLennan, for plaintiffs.

W. H. Blake, K.C., for defendant John T. Moore.

THE MASTER.— . . . The amendments conclude by asking the Court to set aside the pretended election of directors in July last. This involves the question of who are shareholders and who compose the company. Such relief may properly be asked by any shareholder feeling himself aggrieved. In the present action it cannot at this stage be said to be improperly set up by way of counterclaim. The action seeks to have certain transactions between the company and the mortgagees set aside, and that the company be allowed to redeem. It may be that the company as such may be quite willing to ratify these proceedings and to cure any defects in them. This would leave it open to any dissatisfied shareholder to bring his action to open the matter. But it might be a substantial ground of defence that the company, acting through a majority of the shareholders, had confirmed the impeached release of the equity of redemption, and that the minority, however dissatisfied, must submit to anything

that was within the powers of the company and not fraudulent. See *Earle v. Burland*, [1902] A. C. 83, and cases there cited. . . . It is enough to say that a possible ground of defence is thereby indicated, of which defendants cannot be now summarily deprived. . . . *McAvity v. Morrison*, 1 O. W. R. 632.

Motion dismissed. Costs to defendant John T. Moore in the cause.

STREET, J.

OCTOBER 30TH. 1903.

CHAMBERS.

RE REID.

Gift—Donatio Mortis Causa—Evidence—Corroboration—Interested Witness—Intention—Gift of Bank Pass Book.

Motion by executors of Henry Reid for payment of money out of Court. The deceased, an Irishman by birth, lived for many years in Ontario, and accumulated by day labour about \$1,500, which lay at his credit in the savings bank department of the Standard Bank of Canada at Har-riston, Ontario. He was unmarried, and early in 1901 he went to Ireland to see his relatives there. Before doing so he had made a will dividing his money equally amongst certain cousins in Ireland. He stayed in Ireland with his cousin George Armstrong, a married man, from May until November, when he went to stay with his cousin John Armstrong, George's brother, also a married man, who lived a few miles from George. On 30th December, 1901, he was taken very ill at John's house, and a physician was called in who told him he had only a few hours to live and should settle his affairs at once. The doctor then left. In the house at the time with Henry Reid were only John Armstrong and his wife and their young children. John and his wife said that after the doctor left Reid told the wife to bring him his coat, and that upon her doing so he took from the pocket of it the savings bank book of the Standard Bank, in which his deposits were shewn, and handed it to her husband, telling him at the same time that he was giving him the money mentioned in it. Thereupon one of the children was sent out for Owen McCabe, the nearest neighbour, a farmer, who came in, and who said that the book was again formally delivered to John Armstrong by Reid in his presence, and that of Mrs. John Armstrong, with the statement that with this book John could draw the money it represented from any bank in Ireland. The same afternoon John went to the

nearest bank, where the banker explained that a cheque or order upon the bank at Harriston was necessary, and drew up a form of cheque, which John took back to the house. By this time Reid was worse and unable to sign his name. The

his
cheque was produced with the name Henry x Reid written
mark

in the hand of a daughter of John, and with the signatures of Owen McCabe and Mrs. John Armstrong as witnesses. It was admitted that McCabe was not present when the mark was put to it, and that he did not write his name as a witness till the next day. Reid died before seven o'clock upon the same evening. Probate of Reid's will was granted in Ontario on 17th April, 1902, and the executors claimed the money from the bank. It was also claimed by John Armstrong, and the bank paid it into Court. Upon the motion for payment out, evidence was taken upon commission in Ireland.

A. Spotton, Harriston, for the executors.

W. H. Blake, K.C., for John Armstrong.

STREET, J.—The bank pass book contained a printed condition that no part of the deposit could be withdrawn without production of the pass book. The existence of this condition made the delivery of the book, with the intention of passing the money mentioned in it, a valid *donatio mortis causa* of the money: *Brown v. Toronto General Trusts Corporation*, 32 O. R. 319; *In re Western*, [1902] 1 Ch. 680. Upon the evidence I come to the conclusion, though with some hesitation, that a gift was intended. Any evidence which is believed and is corroborated so as to comply with sec. 10 of the Evidence Act may be acted on by the Court: *Re Farman*, 58 L. T. 12; *Carnahan v. McGuire*, 15 Moo. P. C. 215; *Brown v. Toronto General Trusts Corporation*, 32 O. R. 319. Under this rule the evidence of Owen McCabe and the wife of the claimant was sufficient corroboration, although a will in favour of John witnessed by them would have failed to take effect because of the disqualification of the wife as a sufficient witness to a bequest to her husband. It seems to me it would be better to require as high a degree of evidence to prove a *donatio mortis causa* as to prove a will.

Order made for payment of the costs of all parties out of the fund, those of the executors as between solicitor and client, and for payment of the balance to John Armstrong.

BRITTON, J.

OCTOBER 30TH, 1903.

TRIAL.

FENDAL v. WILSON.

Executors and Administrators—Claim of Widow of Intestate to Share in Estate—Notice Disputing—Action by Widow to Establish Marriage—Declaratory Judgment—Administration.

Action by Harriet Fendal against the administrator of the estate of David Fendal, deceased, to establish her marriage with David Fendal and for a declaration that she is entitled as widow to a portion of his estate.

David Fendal died at Brantford on the 12th December, 1902, intestate. The defendant obtained letters of administration. The plaintiff gave notice that she was Fendal's widow. Defendant refused to recognize her as such, and caused a formal notice to be served upon plaintiff disputing her claim. The notice purported to be given under R. S. O. 1897 ch. 129, sec. 35. The plaintiff was not a creditor. She made no claim otherwise than as widow, and shortly after the receipt of the notice she brought this action. Defendant in his statement of defence disputed the marriage. At the trial plaintiff proved that she was duly married to the deceased at Brantford on the 14th January, 1877, and that she and the deceased lived together at Brantford as husband and wife. Defendant made no attempt to controvert this evidence, but he stated that a person, whom he named, had asserted that David Fendal on 14th January, 1877, had a former wife who was then living. No proof was adduced.

W. C. Livingston, Brantford, for plaintiff.

E. Sweet, Brantford, for defendant, argued that plaintiff should have paid no attention to defendant's notice, but should have waited, and after the expiration of a year taken proceedings for administration.

BRITTON, J.—It does not appear that defendant would not, at the expiration of a year as well as now, dispute plaintiff's marriage, and it is not open to defendant now to say that plaintiff should not have acted upon the notice formally given. This action cannot bar the rights of any persons not parties, if such rights exist; but, without prejudice to these, plaintiff is entitled as against defendant as administrator to a declaration that she is the lawful widow of the

deceased. She is entitled to compel defendant, after the expiration of one year from the death of David Fendal, to proceed to administer the estate and make the proper distribution thereof. If any proceedings are taken against defendant in regard to the estate of David Fendal, the defendant should give notice to plaintiff. Plaintiff is entitled to costs of the action out of the estate as against the defendant as administrator.

CARTWRIGHT, MASTER.

OCTOBER 31ST, 1903.

CHAMBERS.

TAYLOR v. TAYLOR.

Writ of Summons — Substituted Service — Motion by Person Served to Set aside — Status of Applicant — Costs.

An order was made for substituted service of the writ of summons on a solicitor, who, on being served, moved to set aside the service.

W. J. Elliott, for the applicant.

H. D. Gamble, for plaintiff, objected that the applicant had no locus standi.

THE MASTER.—Mr. Elliott relied on *The Pomeranian*, 4 P. D. 195, and *Young v. Dominion Construction Co.*, 19 P. R. 139. A consideration of the matter leads me to the conclusion that the objection must be sustained. The case in 4 P. D. seems to have been decided on the merits, and no objection was made that the applicants had no status. The report of the case in 19 P. R. is misleading. The original papers have been sent to me, and from these it appears that the motion was made on behalf of the defendants and not of the solicitors. It may be that the application in *The Pomeranian* was made in the same way.

[Reference to *Heaslip v. Heaslip*, unreported; *Martin v. Martin*, 3 B. & Ad. 937; *McDonald v. Crombie*, 2 O. R. 243, at p. 246.]

While it may still be open to defendant hereafter to move against the order in question and any proceedings founded thereon, I do not think that the applicant is entitled to do so, when he expressly negatives any professional relationship with the defendant. . . .

As the application was apparently justified by the incorrect report in 19 P. R., I consider that justice will be done by dismissing the motion without costs.

OCTOBER 31ST, 1903.

DIVISIONAL COURT.

STANDARD LIFE ASSURANCE CO. v. VILLAGE OF
TWEED.

Summary Judgment—Defence to Action—Municipal Debentures—By-law—No Provision for Payment of Principal—Remedial Statute.

Appeal by defendants from order of FERGUSON, J., ante 747, allowing an appeal from an order of the Master in Chambers, ante 731, and giving leave to plaintiffs to enter summary judgment against defendants for the principal due upon certain debentures issued by defendants and purchased by plaintiffs.

J. A. Mills and C. W. Craig, Tweed, for defendants.

A. Bruce, K.C., and D. L. McCarthy, for plaintiffs.

The judgment of the Court (BOYD, C., MACMAHON, J., TEETZEL, J.) was delivered by

BOYD, C.—The village of Tweed raised \$5,000 to assist a local enterprise, and secured it by five debentures for \$1,000 each issued on 9th August, 1892, and payable at the end of ten years, with interest meanwhile half-yearly. All the interest has been punctually paid, and the time has elapsed for payment of the principal, which fell due on 25th March, 1902. The by-law makes no provision for the payment of the principal of these debentures, and, unless the transaction has been validated by the Legislature, there exists no legal right to sue for the principal money on these debentures, which have no higher binding force than the by-law.

The statute 44 Vict. ch. 24, sec. 27, which was carried into the Consolidated Municipal Act of 1883 as sec. 409, provides for validating any debentures theretofore issued under any by-law where the interest on such debentures and the principal of such thereof (if any) as shall heretofore have fallen due has been heretofore paid for the period of two years or more.

In the revision of 1887 the provision was (apparently improvidently) limited to debentures issued prior to July, 1883 (R. S. O. 1887 ch. 184, sec. 408), and the like limitation was carried forward into the next decennial revision, R. S. O. 1897 ch. 223, sec. 432.

On 27th June, 1903, this section was repealed and a new provision substituted in these words: "Where in the case of any by-law heretofore or hereafter passed the interest for one year or more on the debentures issued under such by-law and the principal of the matured debentures (if any) has or shall have been paid by the municipality, the by-laws and the debentures issued thereunder remaining unpaid shall be valid and binding," etc.: 3 Edw. VII. ch. 18, sec. 93; ch. 19, sec. 432.

It is to be borne in mind that municipal debentures are broadly of two classes: (1) in which the principal money is to be paid at the end of a fixed period, with interest payable in the interval; and (2) in which the principal is payable by annual instalments with proportionate interest: Municipal Act, R. S. O. 1897 ch. 223, secs. 384, 386.

The principle enunciated in the curative enactment appears to be that one payment of interest will validate the debentures in respect of which it is paid, and one payment of principal will validate the series in respect of which it is paid. It cannot be said that the original section of 1881 is happily or even lucidly expressed, and it has not been made plainer in the course of subsequent legislation. Yet I think the present section yields the net result I have endeavoured to indicate, and with such sufficient clearness as may justify the Court in so expounding it. . . .

Appeal dismissed with costs.

OCTOBER 31ST, 1903.

DIVISIONAL COURT.

PRESTON v. JOURNAL PRINTING CO. OF OTTAWA.

Libel—Justification—Qualified Privilege—Answer to Public Statement—Judge's Charge—Findings of Jury—Perverse Verdict.

Motion by plaintiff to set aside verdict and judgment for defendants in an action for libel tried before MEREDITH,

J., and a jury at Ottawa, and for a new trial, upon the ground that the verdict was perverse. The plaintiff, being under cross-examination before a special committee of the Senate, was asked whether one John Rochester, his uncle and the father of John E. Rochester, had not, in an action tried at Cobourg several years previously, brought by plaintiff against one Traves, sworn that he would not believe the plaintiff on oath. Plaintiff answered that John E. Rochester had so sworn, and he then proceeded to account for Rochester's having so sworn by stating that there had been a family feud between the Rochester branch of the family and plaintiff's branch, arising out of a law suit, tried at Ottawa, in which plaintiff's father was plaintiff, and John E. Rochester had some interest on the other side, and in which plaintiff's father had been successful; that 15 years later plaintiff himself had an action against one Traves, which was tried at Cobourg before Galt, C.J., and in which John E. Rochester had sworn that he would not believe plaintiff on oath; that Galt, C.J., himself took Rochester in hand and after examining him for a few minutes told him that if he did not leave the court house in one minute he would instruct the County Crown Attorney to prosecute him for perjury; and that when John E. Rochester was on his death-bed he sent plaintiff a message asking forgiveness. The letter published by defendants of which plaintiff complained was written by John Rochester in reply to these statements. In it he referred to the evidence given by plaintiff before the Senate committee, which had been published a day or two before in the newspapers, and asked to be allowed to give a little evidence in regard to plaintiff. He said that plaintiff's father had lost and not gained the Ottawa law suit, and insinuated that plaintiff had made a wilful misstatement in regard to that matter. He further referred to the fact that plaintiff's father had been collector of the city of Ottawa and had improperly used funds of the city, and that the law suit in question had some connection with that. He denied that Galt, C.J., had threatened John E. Rochester with prosecution for perjury, suggested that plaintiff's statement to that effect was wilfully untrue, and said that if the Judge made such a statement, which was denied, it would most likely have been addressed to plaintiff or plaintiff's father. He characterized the statement that John E. Rochester on his death-bed had asked plaintiff's forgiveness as an unqualified falsehood; said that the statement would appear ridiculous to all who knew that the deceased invariably referred to plaintiff as "a polished scoundrel" and "an infamous rogue;" and he wound up by asking defendants to publish his denial of the

false evidence given before the Senate committee by plaintiff, whom he described as "this charlatan." Part of the cross-examination of plaintiff for discovery was read by defendants. Plaintiff there stated that the Senate committee in question was investigating certain charges made by one Cook that he had been offered a Senatorship if he would pay the party in power a considerable sum of money, and that in the course of Cook's evidence before the committee he stated that plaintiff was one of the persons who had conveyed the offer to him. It appeared from the evidence that there had been two or three lawsuits at Ottawa in which plaintiff's father was concerned, and that he had succeeded in one of them, to which the late John E. Rochester was not a party, and had failed in another, the parties to which were plaintiff's father and John E. Rochester. There was conflicting evidence as to what had taken place at the Cobourg trial, and there was no evidence to support plaintiff's assertion that John E. Rochester had asked his forgiveness. The trial Judge advised the jury to lay the two statements side by side, that is, the evidence given by plaintiff before the Senate committee, and the letter published by defendants, and to take all the circumstances into their consideration, and if they were not able to say that the statements in the letter were true, then to consider whether they were a fair answer by John Rochester in defence of John E. Rochester's memory; that, if they considered the statements in the letter were a fair answer to what was said by plaintiff before the committee, their verdict should be for defendants; if they found the libel proved, they should find for plaintiff. He explained to them fully what constituted a libel. The charge was not objected to, and the jury found for defendants.

F. A. Anglin, K.C., for plaintiff, argued that the letter published by defendants was clearly libellous, and the jury were bound to find it so; that the defence of justification failed, and there was no case of privilege made out, so that the defence of fair comment also failed.

G. F. Henderson, Ottawa, for defendants.

The Court (STREET, J., BRITTON, J.) held that if the circumstances were not such as to raise the question of privilege, the plaintiff should not have allowed the case to go to the jury without objection upon the Judge's charge, which clearly treated the case as one of qualified privilege: *Wills v. Carman*, 17 O. R. 223; *Parsons v. Queen Ins. Co.*, 43 U. C. R. 271; *Macdonell v. Robinson*, 12 A. R. 270. It must be assumed in favour of defendants that the jury did as they were directed by the Judge, that is, laid plaintiff's evidence

before the committee beside the letter of John Rochester, and came to the conclusion that the letter was a fair answer in defence of John E. Rochester's memory to plaintiff's statements. The finding of the jury upon the point which both parties appeared to have regarded as decisive of their rights, must be treated as final, there being no suggestion that the point in question was unfairly submitted to them.

Motion dismissed without costs.

THE ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING NOVEMBER 7TH, 1903.)

VOL. II. TORONTO, NOVEMBER 12, 1903. No. 38.

STREET, J.

NOVEMBER 2ND, 1903.

CHAMBERS.

GRAHAM v. BOURQUE.

Chose in Action—Assignment of—Scope—Money to Become Payable “in Respect of the Contract”—Compensation for Breach of Provision Implied in Contract—Attachment of Debts.

Joseph Bourque, one of the judgment debtors, made a contract with the corporation of the city of Ottawa for the construction of a drain in Ottawa; he then entered into arrangements with the Bank of Ottawa to borrow the money for carrying on the work. As part of the security for the advances to be made to him he assigned to the bank “all and every sum or sums of money now due or to become due and payable to me by the corporation of the city of Ottawa in respect of a certain contract existing between myself and the said corporation for the construction of section 3 of the main drain in the said city of Ottawa.” By the same instrument he appointed the bank his attorneys to recover the same and to give releases therefor. While Bourque was proceeding with his work under the contract he found himself hindered and put to additional expense by the fact that the corporation continued to send water down certain existing street drains of theirs, which water found its way into the works of Bourque under his contract owing to defects in the drains through which the water was sent down. The money required from and advanced by the bank to Bourque for the purpose of completing his contract work was largely increased because of the expense of getting rid of this water and the damage and inconvenience caused by it. Bourque brought an action against the corporation to recover the additional cost occasioned by this

water as damages, and obtained a judgment for \$2,810.50. The judgment creditor attached this judgment debt, and the bank claimed the money under the assignment. The Judge of the County Court of Carleton, before whom the garnishee proceedings were had, held that the debt did not pass to the bank under the assignment, and ordered payment to be made by the corporation, the garnishees, to the judgment creditor. The bank appealed.

W. E. Middleton, for the bank.

J. H. Moss, for the judgment creditor.

STREET, J.—In my opinion the Bank of Ottawa are entitled under the assignment from Bourque to receive from the city the moneys in dispute here. The language of the assignment extends to all moneys which may become payable "in respect of the contract." The contract between Bourque and the city gave rise to a duty or to an implied contract, no matter which, binding the city to do nothing to impede Bourque in the execution of the work and to a liability to compensate him if they should do anything to impede him. If this had been set forth in the contract, it is clear that the compensation would have passed to the bank under the assignment; but the same duty on the part of the bank to pay, and the same right to the contractor to receive, compensation, although not set forth in express language in the contract, arise out of the mere fact that such a contract has been made; and therefore the compensation should be held to be moneys payable "in respect of the contract."

Appeal allowed with costs to the bank here and below.

MEREDITH, C.J.

NOVEMBER 2ND, 1903.

WEEKLY COURT.

RE SOMBRA PUBLIC SCHOOL SECTION 26.

Public Schools—Selection of School Site—Difference between Trustees and Ratepayers—Power of Arbitrators as to Selection—Award—Setting aside—Reference back.

Application by the trustees of public school section No. 26 of the township of Sombra to set aside an award of arbitrators appointed under the provisions of sec. 34 of the Public Schools Act (1 Edw. VII. ch. 39), in consequence of a difference of opinion between the trustees and the ratepayers as to the suitability of the site which the trustees had selected for the school house of the section, which had been recently formed.

W. E. Middleton, for the applicants.

W. R. Riddell, K.C., and A. B. Carscallen, Wallaceburg, for the respondents.

MEREDITH, C.J.—The main question argued was as to the power of the arbitrators to fix as the site any other place than that selected by the trustees, the contention of the applicants being that their only jurisdiction was to determine whether or not the site selected by the trustees was a suitable one.

I have reluctantly come to the conclusion that this contention is well founded.

It is no doubt the duty of rural school trustees to provide adequate accommodation for two-thirds of the children between the ages of five and sixteen years resident in the section (sec. 65 (3)), and to purchase or rent school sites or premises and to build school houses (sec. 65 (4)); and they may select a site for a new school house, but, according to the provisions of sub-sec. 1 of sec. 34, no site may be adopted, "except in the manner hereinafter provided," without the consent of the majority of the ratepayers present at a special meeting, which the trustees are required to call for the purpose of considering the site selected by them.

In case of a difference between the trustees and the majority of the ratepayers as to the suitability of the site selected by the trustees, provision is made by sub-sec. 2 of sec. 34 for an arbitration and award upon the matter submitted to the arbitrators.

Beyond this bald statement there is no provision as to what is to be the scope of the reference; but it appears to me that what is meant by the expression "the matter submitted" must be the question of the suitability of the site selected by the trustees. There is nothing in the language used to indicate that it was intended to confer upon the arbitrators power to fix the site, though the site determined on by them differed from that selected by the trustees. The scheme of the Act seems to be that the trustees must initiate the proceedings which are to result in the adoption of the site, by selecting what they deem to be a suitable one, but that they may not adopt it as the site without the consent of the ratepayers, unless, upon a difference and consequent reference to arbitration in manner provided by sec. 34 (2), an award has been made approving of the site which the trustees have selected.

If there were no provision for arbitration, it is clear that the site selected by the trustees may not be adopted by them without the consent of the majority of the special meeting, and all that the Legislature has done, as it appears to me, is to provide that where that consent cannot be obtained there may be substituted for it the approval of the arbitrators.

I should have much preferred to have come to a different conclusion, for it is obvious, I think, that the construction

which I have felt myself compelled to place upon the statute may make it very difficult where, as in this case, there is a bitter conflict between the trustees and the majority of the ratepayers, to reach a conclusion which will enable the trustees to perform their statutory duty of providing adequate school accommodation for the children of the section; for if, as I think, it was the duty of the arbitrators in this case, having come, as I assume they did, to the conclusion that the site selected by the trustees was not a suitable one, to have confined their award to so determining, it will be impossible to reach the point of adopting a site until the trustees and the majority of the ratepayers are of one mind, or the arbitrators appointed have reached the conclusion that some site selected by the trustees is a suitable one.

Having come to this conclusion, it is unnecessary to deal with the other questions argued in support of the application.

The result is that the award must be set aside, but without costs, unless the respondents desire that the matters referred should be remitted to the arbitrators in order that they may make an award approving or disapproving of the site selected by the trustees, with a declaration as to the powers of the arbitrators under the reference, in accordance with the opinion I have expressed. If the respondents so elect, such an order may go, without costs to either party, unless the appellants desire to be heard on this point, and if they desire to be heard no order will issue until further argument has been had.

MEREDITH, C.J.

NOVEMBER 2ND, 1903.

WEEKLY COURT.

RE ARTHUR AND MINTO UNION SCHOOL SECTION 17.

Public Schools—Formation of Union School Section—Award—Appointment of Arbitrators—Township Councils—By-law—Resolution—Description of Lots—Reference to Petition—Municipal Clerk as Arbitrator—Necessity for Unanimous Award—Time for Publishing Award—Uncertainty as to Surplus Moneys—Reference back to Arbitrators.

An application by the trustees of public school sections numbers 12 and 13 in the township of Minto to set aside an award made on the 25th May, 1903, by David Clapp and George Cushing, providing for the formation under the authority of sec. 46 of the Public Schools Act (1 Edw. VII. ch. 39) of a new union school section, to be called union school

section No. 17 in the townships of Arthur and Minto, and to consist of certain named lots in the two townships.

W. Kingston, K. C., for the applicants.

A. Spotton, Harriston, for the respondents.

MEREDITH, C.J.—The first objection taken to the award is that the respective township councils should have appointed their arbitrators by proper by-laws, and that the by-laws should have set out the parcels of land “to be arbitrated on,” and that this was not done.

The municipal council of the township of Arthur appointed an arbitrator by a formal by-law, signed by its reeve and clerk and under the corporate seal of the municipality, and in this respect the appointment is unobjectionable. The instrument by which the council of Minto appointed an arbitrator is in form a resolution, but it is under the corporate seal of the municipality and signed by the reeve and clerk, and is, I think, quite sufficient to constitute a valid appointment of an arbitrator.

Both the by-law and the resolution refer to the petitions which had been presented to the respective councils for the formation of the union section, and are not, even if, had no such reference been made, they would have been defective, open to the objection taken to them.

It was not, in my opinion, necessary to set out a description of the lots referred to in the petition; it was quite sufficient if the petition upon which the council was proceeding, was referred to so as to identify it, and that was done.

The next objection is that each of the municipal councils appointed its clerk as arbitrator.

Whatever inconveniences, if any, may arise from the appointment of the clerk of the municipality as an arbitrator, I see nothing to prevent its being done or to disqualify him. Section 46 forbids the appointment of a member of the council, and had it been intended that the council should not be at liberty to appoint its clerk, the Legislature would no doubt have so provided; nor is the fact that it is made the duty of the clerk to notify the inspector of the appointment of the arbitrator, incompatible with his being himself the arbitrator.

The fourth objection is that the award was not an unanimous one.

This objection is also, in my opinion, not well founded. The provisions of the section guarding against the possibility of the number of arbitrators being an even one, was introduced to prevent the arbitration proving abortive owing to an equal division of opinion, and indicates clearly, I think, that it was not intended that unanimity should be required.

The arbitrators in this case were moreover, in my opinion, appointed to fulfil a public duty, and unanimity was not therefore required: Russell on Awards, 7th ed., p. 216.

The sixth objection fails also. The award was made and published within three months after the arbitrators entered on the reference.

There remains to be considered the fifth objection, which is that the award is "uncertain as to the surplus moneys."

This objection is, I think, well founded. In dealing with the matters provided for by sub-sec. 8, the arbitrators have awarded that certain named percentages of any surplus moneys on hand on the 31st December next shall be paid by the trustees of school sections 7 and 11 of Arthur and by the trustees of school sections 12 and 13 of Minto to the trustees of the union section, and that the owners of certain lots in Arthur shall have refunded to them by section 7 of Arthur any sum which they have paid within the last five years, or should afterwards be required to pay for debenture indebtedness for the erection of a school house in that section.

The award in these respects is uncertain and therefore invalid, but the case is one in which I should not, I think, set aside the award, but should remit the matters referred to the arbitrators in order that what is wrong may be set right, and it will be well for the arbitrators, in reconsidering the matters referred, to make more clear what they mean by directing "the said several sums to be in full of all claims and demands which said union school section No. 17 may have against the said respective school sections in respect of school premises, equipment, and moneys on hand or other manner."

Following, as this provision does, the direction to which I have referred, that section No. 7 of Arthur is to refund certain moneys to the landowners mentioned in the award, its meaning is obscure, though probably what is referred to in the provision I have quoted is the payments which the four school sections are required to make to the union section.

There will be no costs to either party of the motion or of the reference back.

MACMAHON, J.

NOVEMBER 2ND, 1903.

TRIAL.

CITY OF TORONTO v. MALLON.

Landlord and Tenant—Action for Rent—Agreement for Lease — Refusal to Sign Lease — Taking Possession — Possession Referable to Agreement—Use and Occupation.

Action by the city corporation to recover money as rent for certain butchers' stalls in a new market erected by plaintiffs.

J. S. Fullerton, K.C., and W. C. Chisholm, for plaintiffs.

F. A. Anglin, K.C., for defendants.

MACMAHON, J.—. . . At the time stalls 2, 72, and 74 were knocked down by the auctioneer to defendants, they had left with their agent a marked cheque payable to the order of the city treasurer, which was intended to be a deposit equal to the first month's rent. That cheque was delivered to the city treasurer; but on the following day Mr. Mallon wrote to the mayor stating that he was not aware at the time of the sale that any favouritism was being shewn in the sale of the stalls in the market by any one tenant over another, but that, having since the sale ascertained that there was favouritism, he had for that reason decided not to take the stalls which had been knocked down to him; but that he had given instructions to the bank not to honour the cheque.

If the matter had ended there, of course this action must have failed, as there was no present demise. However, defendants took possession of stalls 2 and 72 on the 15th November, and continued to occupy them, and must be held to have taken possession under the agreement signed on the day of sale. . . .

The contract signed by defendant Mallon after the sale for stall number 2 is on a printed form prepared by the city, and reads: "Toronto, August 27th, 1902. I have to-day agreed to lease from the city of Toronto stall No. 2 in new St. Lawrence market for one year from 1st November, 1902, at monthly rent of \$94, and agree to execute lease according to printed conditions of leasing when notified by city solicitor. John Mallon, per F.S."

The contracts for stalls 72 and 74 are the same except as to the rent; that for 72 being \$45 and for 74 being \$16 a month.

Specific performance would not be decreed, as the agreements for leases are each only for a year, and there were only

five months for each of the terms to run when the action was brought, and the time had actually expired when the case came on for trial in the County Court. In *Glasse v. Woolgar*, 41 Sol. J. 573. Chitty, L.J., said: "No one ever heard of granting specific performance even for a year." See also *De-Brassac v. Martin*, 41 W. R. 1020; *Lever v. Kotter*, [1901] 1 Ch. 547; and *Mara v. Fitzgerald*, 19 Gr. 52.

The defendants having on the 15th November taken possession of the two stalls, it must be assumed, as already stated, that they entered and took possession as of right under the agreement to accept leases, and not as wrongdoers or wilful trespassers. Now, long prior to the defendants taking possession, the Davies company had been carrying on business in the stalls leased by them, and it was the alleged suppression by Alderman Lamb of the offer that had been made by the Davies company for these stalls south of the gangway, which the defendants regarded as favouritism shewn to that company, and because of that belief that they wrote the letter of the 28th August repudiating the contracts to lease signed by them. The defendants first repudiate the contracts they had signed because of the alleged suppression of a fact which they say amounted to a misrepresentation regarding the property on which they were bidding, and after nearly three months from such repudiation they take possession of two of the stalls for which they signed contracts, and their so doing must be taken as a waiver of their objection on the ground of favouritism. As said by Lord Cottenham in *Vigers v. Pike*, 8 Cl. & F. at p. 650: "In a case depending on alleged misrepresentation of value, there cannot be a more effective bar to the plaintiff than by shewing that he was from the beginning cognizant of all the matters complained of, or after full information of them continued to deal with the property."

Had the defendants before taking possession of stalls numbers 2 and 72 communicated with any officer of the corporation having authority to bind the city, and arranged that their taking possession was not to be considered as being under the contract, their position would have been very different from what it now is; but they were in possession for three months before communicating with the city treasurer, and they must, as I have already said, be considered as having waived any objection and to have taken possession under the agreements they had signed, and, as the city did not object, it will be assumed they occupied the stalls with the assent of the city.

Although specific performance must, for the reasons stated, be refused, the plaintiffs have a right, where the devise is not by deed, under 11 Geo. II. ch. 19, sec. 14, to recover for use

and occupation, and may use any agreement (not being by deed) whenever a certain rent is reserved, as evidence for the question of damages to be recovered: *Elliott v. Rogers*, 4 Esp. 59; *Woodfall* (15th ed.), 568.

The city allowed the defendants two months' rent from 15th November for the removal of their ice boxes, so that there would be due the city rent from the 15th January, 1903, as follows:

Three months' rent for stall 2. from 15th	
January to 15th April, at \$94.....	\$282 00
Three months' rent for stall 72, at \$45....	135 00
	<hr/>
Credit	\$417 00
By amount of cheque	\$200 00
	<hr/>
Balance	\$217 00

There will be judgment for the plaintiffs for this sum with costs.

I find that a fair rental for stalls 2 and 72 would be \$25 a month each, so that, if it is found I am wrong in the assessment of the damages, a court of appeal can set it right.

NOVEMBER 2ND, 1903.

DIVISIONAL COURT.

STANDARD TRADING CO. v. SEYBOLD.

Security for Costs—Increase in Amount—Costs Thrown away by Postponement of Trial—Postponement Caused by Defendants' Amendment—Responsibility for Increase in Costs.

Appeal by defendants J. A. Seybold and J. R. Booth from order of OSLER, J.A., ante 878, reversing order of a local Master requiring plaintiffs to give additional security for costs.

C. J. R. Bethune, Ottawa, for appellants.

John T. C. Thompson, Ottawa, for plaintiffs.

THE COURT (STREET, J., BRITTON, J.) affirmed the order and dismissed the appeal with costs.

NOVEMBER 2ND, 1903.

DIVISIONAL COURT.

COOK v. DODDS.

Promissory Note—Statute of Limitations—Acknowledgment—Payments by Executor de son Tort—Joint Note—Death of One Maker—Remedy against Estate—Bills of Exchange Act—Trustee Act—Provision as to Joint Contractors.

Appeal by defendants from judgment of 2nd Division Court in county of Huron in favour of plaintiff.

The defendants were sued as executors of Peter Dodds, deceased, to recover the amount of a promissory note for \$200, dated 10th January, 1891, made by deceased and one Thomas Dodds, payable, with interest at 7 per cent., to the plaintiff one year after date.

At the trial plaintiff gave evidence of acts done by defendant Ellen Dodds sufficient to charge her as executrix de son tort of the deceased, and also proved that she had made payments of interest on the note within six years before action.

Unless the payments of interest made by her operated to save plaintiff's right of action, the right to recover on the note was admittedly varied by the Statute of Limitations.

W. E. Middleton, for appellants, relied on the Limitations Act, and also contended that, inasmuch as the promissory note was a joint one, and the other maker had survived Peter Dodds, there was no right of action against the estate of the latter.

W. Proudfoot, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J.—It is, I think, not open to doubt that a payment or acknowledgment by an executor de son tort cannot be relied on to prevent the Statute of Limitations from operating as a bar, where the action in which it is set up is brought against the lawful personal representative of the deceased.

The principle upon which a part payment has been held to give a new starting point for the running of the statute is, that it is an acknowledgment from which the law raises the implication of a promise to pay the residue of it, and the rule is therefore quite inapplicable, as it seems to me, to

a payment by an executor de son tort; such an executor is treated as an executor only for the purpose of fixing liability upon him, and his acts are good against the lawful representative of the deceased only where they are lawful and such as the true representative was bound to perform in the due course of administration: *Graysbrook v. Fox*, Plowd. 282; *Buckley v. Barber*, 6 Ex. at p. 183. And even where letters of administration have been subsequently granted to him, the previous acts of an executor de son tort to the prejudice of the estate are not made good by the subsequent administration: *Morgan v. Thomas*, 8 Ex. 302.

Grant v. McDonald, 8 Gr. at p. 475, and *Haselden v. Whitesides*, 2 Strobhart L. 353, are in accordance with this view.

But, granting this, it does not follow necessarily that plaintiff was not entitled to recover. Neither the rights of a lawful representative of the deceased nor those of the persons beneficially entitled to the estate of the deceased are in question. All that plaintiff is seeking is that the executrix de son tort be made answerable to her to the extent of the goods of the deceased which have come to her hands. . . .

Where the defendant pleads ne unques executor, and that plea is found against him, and . . . it will be found against him though it is shewn that he is but an executor de son tort, it appears to me that it is not open to him for the purpose of preventing a payment made by him, which, if it had been made by the lawful personal representative, would have prevented the Statute of Limitations from operating to bar plaintiff's claim, to rely upon his having been a wrong-doer and not the true personal representative; in other words, that, as between him and plaintiff, as respects the payments made by him and their effect, he must be treated as the true representative of the deceased. If the creditor may for the recovery of his debt proceed against him as the true personal representative of the deceased, in order to reach the personal estate of the deceased which has come to his hands, why may he not for the same purpose treat him as the true representative in making the payment on account of his claim against the deceased?

As I have already pointed out, in *Grant v. McDonald*, and in the South Carolina case, the true representative was sought to be made liable, and in the latter case *Withers. J.*, who delivered the judgment of the Court, pointed out that their decision had nothing to do with actions instituted against executors de son tort as such.

The result of giving effect to the contention of the appellants would be an injustice to the plaintiff, who no doubt refrained from bringing her action within the six years because of the payments which were made to her by one who assumed to be and whom she was entitled to treat as the executrix of the estate of the deceased, and I see no reason why the payments made by the defendant Ellen Dodds should not as against her, and for the purpose of enabling the plaintiff to reach the goods of the deceased which have come to her hands, be treated as having been made by the legal personal representative of the deceased,—the character which the defendant Ellen Dodds assumed, and, as the plaintiff had the right to think, rightly assumed.

The objection based upon the promissory note being a joint one is not, in my opinion, entitled to prevail. The Bills of Exchange Act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or promissory note contains,—whether that of a joint or joint and several liability. These consequences, in my opinion, fall to be determined according to the law of the Province in which the liability is sought to be enforced, and, inasmuch as in this Province the common law rule as to joint contracts has been superseded by statutory enactment, R. S. O. ch. 129, sec. 15, the provisions of the latter are to govern in determining the right of the respondent to sue in this Province. . . .

Upon the whole, I am of opinion that the judgment should be varied by adding after the words “goods and chattels of the deceased” the words “in her hands to be administered,” and by substituting for the word “defendant” before the word “proper,” the words “defendant Ellen Dodds,” dismissing the action as against the defendant Thomas Dodds; and with that variation should be affirmed and the appeal dismissed without costs.

CARTWRIGHT, MASTER.

NOVEMBER 3RD, 1903.

CHAMBERS.

GURNEY FOUNDRY CO. v. EMMETT.

*Evidence—Cross-examination of Officer of Company—Parties
—Refusal to Attend—Remedy—Motion—Forum.*

Motion by defendants to dismiss action for default of an officer of plaintiffs to make production and attend to conclude

his cross-examination on an affidavit filed on a pending motion for an injunction.

J. G. O'Donoghue, for defendants.

E. E. A. DuVernet, for plaintiffs, contended that defendants' remedy, if any, was under Rule 454, and that the motion should be to the Court: *Badgerow v. Grand Trunk R. W. Co.*, 13 P. R. 132; *Central Press Assn. v. American Press Assn.*, ib. 353.

THE MASTER allowed the objection and dismissed the motion with costs to plaintiffs in any event.

CARTWRIGHT, MASTER.

NOVEMBER 3RD, 1903.

CHAMBERS.

ROBERTS v. CAUGHELL.

*Mortgage—Foreclosure—Final Order after Abortive Sale—
New Day—Rule 393—Time for Redemption.*

After the decision in this case ante 799, F. E. Hodgins, K.C., for plaintiff, moved for a new day and in default foreclosure.

E. Meek, for defendant, contended that this was not a case for foreclosure, as no benefit would accrue therefrom to plaintiff. In any case he asked for three months' indulgence as in *Scarlett v. Birney*, 15 P. R. 283, and cases there cited.

THE MASTER.—Plaintiff relied on Rule 393 as limiting the time to one month. I think this construction must be put on it, otherwise it would be useless and unmeaning. If the Court is of opinion that it still leaves *Scarlett v. Birney* as an authority, it must be left to the Court to say so.

I also think that no weight is to be given to the argument against any foreclosure. If it will be of no use to plaintiff, it is for him to say so.

The order must go fixing the 4th December as the new day, and in default foreclosure. It may be that Rule 393 does not prevent an application for a further extension. That remains, perhaps, for future consideration in a proper case.

NOVEMBER 3RD, 1903.

DIVISIONAL COURT.

DUPRAT v. DANIEL.

Lease—Action to Set aside—Improvidence—Lack of Independent Advice—Lease Executed on Sunday.

Appeal by plaintiff from judgment of FERGUSON, J. (1 O. W. R. 561) dismissing with costs an action brought by plaintiff to set aside a lease made by her and her deceased brother for their lives and the life of the survivor of them to defendant. Plaintiff and her brother were entitled for their joint lives and the life of the survivor of them to 50 acres of land, and they made a lease to defendant for the term of their ownership, reserving certain rooms in the house for their own use, and defendant agreeing by way of rent to supply them with proper board, doctor's attendance, and the use of a horse and buggy when required. A sum of \$12 per month was to be paid the lessee for the board of Calixte Dupont, the brother. He died a few days after the lease was executed, and plaintiff was his legal representative. The plaintiff alleged that the lease was improvident; that plaintiff in making it had no independent advice; and that it was executed on Sunday. No power of revocation was reserved to the lessors, but there was the usual proviso for re-entry in case the tenant should fail in his duties.

A. B. Aylesworth, K.C., for plaintiff.

M. Wilson, K.C., for defendant.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held, upon the evidence, that the conclusion arrived at by the trial Judge upon the questions of improvidence and lack of independent advice should not be interfered with. Also, that there was a parol agreement and part performance of it before the actual execution of the lease, which was on a Sunday. But in any event this was not a sale or purchase or a contract for the sale or purchase of real property; it was a lease of real property, and not within the terms of sec. 9 of R. S. O. ch. 246. See *Lai v. Stall*, 6 U. C. R. 506.

Appeal dismissed with costs.

CARTWRIGHT, MASTER.

NOVEMBER 4TH, 1903.

CHAMBERS.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Writ of Summons—Order Permitting Service out of Jurisdiction — Motion to Set aside for Irregularity — Affidavit — British Subject—Right to Relief Claimed—Omission to Verify Part of Claim—Neglect to State Grounds of Irregularity—Rule 362.

Motion by defendant to set aside order for service of writ of summons out of jurisdiction, on grounds of irregularity.

C. B. Nasmith, for defendant.

G. H. Kilmer, for plaintiffs.

THE MASTER.—The main grounds of objection were as follows:—

(1) Affidavit of solicitor stated that he was informed and believed that defendant was a British subject, but gave no grounds, as required by Rule 518.

This objection is disposed of by *Fowler v. Barton*, 20 Ch. D. 240, 245; *Dickson v. Law*, [1895] 2 Ch. 65. The defendant does not attempt to deny the fact.

(2) Affidavit of solicitor does not state "that in the belief of the deponent the applicant has a right to the relief claimed," as required by Rule 163.

The affidavit, however, does state belief "that the plaintiffs have a right to be allowed to serve the writ in said proposed action upon the defendant, and that they have a good cause of action."

In my opinion, this is a substantial compliance with the Rule. Even if not, the language of North, J., in *Dickson v. Law*, *supra*, seems very applicable.

The mortgages in respect of which plaintiffs are seeking relief are mentioned in the indorsement on the writ, though not referred to in the memorandum of account made an exhibit on the motion for the order.

The only point on which I entertain any doubt is whether the affidavit was sufficient as referring only to one mortgage, when the indorsement on the writ refers to three . . . Defendant was not being misled in any way.

In order to avoid any question, I allow an affidavit to be filed more specifically referring to them. The motion will then be dismissed, and costs will be in the cause.

I think it well to note that Mr. Kilmer took a preliminary objection that Rule 362 had not been complied with. . . .

I do not find either in the notice of motion or affidavit filed any mention of any "irregularity complained of and the several objections intended to be insisted on" (see Rule 362.) Had the objection been pressed (or if still desired to be pressed), it must prevail, and the motion be dismissed with costs. Those who complain of irregularities are bound to be strictly regular.

The plaintiffs can elect which order they will take.

BOYD, C.

NOVEMBER 4TH, 1903.

WEEKLY COURT.

BURDETT v. FADER.

Injunction—Attempt to Restrain Defendant from Disposing of Property—Status of Plaintiff—Verdict for Damages—Judgment not Entered.

Motion by plaintiff to continue an interim injunction granted by the local Judge at Peterborough restraining defendant from disposing of certain shares in the Traders' Screwless Door Knobs Company so as to defeat plaintiff's claim against defendant. In this action plaintiff had recovered a verdict against defendant for \$700 for libel, but the entry of judgment had been stayed, and an appeal was pending.

D. O'Connell, Peterborough, for plaintiff.

R. D. Gunn, K.C., for defendant, contended that plaintiff was not a creditor and not entitled to an injunction.

BOYD, C.—Plaintiff obtained the injunction ex parte upon an affidavit alleging that defendant intended to sell his stock to defraud the plaintiff and to leave the country with the proceeds. Plaintiff is not yet a creditor, much less a judgment creditor. Plaintiff may or may not get judgment in the case, but he proposes to restrain the sale or disposition of the stock by the defendant till the action is finally determined. There

is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing, and the status of creditor not established, it is not the course of the Court to interfere quia timet, and restrain defendant from dealing with his property, until the rights of the litigants are ascertained. See Parker on Frauds on Creditors. p. 211; Holmsted and Langton's Jud. Act, p. 80; Newton v. Newton, 11 P. D. 11, 13; Campbell v. Campbell, 29 Gr. 252, 254. Injunction not continued; costs to be disposed of when the action is determined.

NOVEMBER 4TH, 1903.

DIVISIONAL COURT.

RE CONFEDERATION LIFE ASSOCIATION AND
CLARKSON.

*Will—Executors—Power to Sell Lands—Power to Exchange—
Vendor and Purchaser.*

Motion. (referred by agreement to a Divisional Court) under the Vendors and Purchasers Act in respect of an objection taken to the title by the purchaser. The question arose upon the will of Elizabeth Trolley, dated 6th June, 1881, by which she devised her real estate to be equally divided between her children when the youngest attained 21, with a power to the executor "to sell or dispose of any or all of the above real estate, should he think it in the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales."

C. P. Smith, for vendors.

M. H. Ludwig, for purchaser.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that under this power the executors had no authority to exchange the lands of the testatrix for other lands. *Philps v. Harris*, 101 U. S. Sup. Ct. 370, and *Winters v. McKinstry*, 1 Man. L. R. 296, referred to.

CARTWRIGHT, MASTER.

NOVEMBER 5TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO. v.
LEADLEY.SASKATCHEWAN LAND AND HOMESTEAD CO. v.
MOORE.*Solicitor—Authority to Bring Action in Name of Company—
Determination of Question—Dismissal of Action—Adding
Shareholders as Parties.*

Motion in each of these actions to dismiss it with costs on the ground that the solicitor who began the action had no authority to use the name of the plaintiff company, or in the alternative that all shareholders on whose behalf or for whose benefit the solicitor purported to bring the same be added as parties plaintiff.

A. J. Russell Snow, for defendants the Moores.

J. W. St. John, for defendants the Leadleys.

W. N. Ferguson, for plaintiff.

THE MASTER.—The second alternative cannot be extended to the action against Moore, because it can only be brought by the company itself.

As to both actions, I do not think it necessary to add anything to what I have said previously as to the facts. (See 2 O. W. R. pp. 745, 850.)

I think these are motions which should have been made by defendants at the outset. On the argument it was noted by me at the time that it was agreed by counsel that the proper course was to have this question of authority of solicitor determined by a duly constituted meeting of the company itself, and I think an examination of the authorities previously referred to shew that this is the proper course.

I therefore order: (1) that the action against Moore separately be stayed until this is done; (2) that the other action be stayed in the same way, unless plaintiffs will consent to an order being made as in *Murphy v. International Wrecking Co.*, 12 P. R. 423.

The costs will be costs in the cause.

TEETZEL, J.

NOVEMBER 5TH, 1903.

CHAMBERS.

RE INNES.

Will—Construction—Charitable Gift—Condition—Gift over—Interest.

Motion by executors under the wills of Helen Innes and James Innes for an order declaring the construction of the will of Helen Innes, particularly clause 5, which reads as follows: "I give and bequeath the residue of my estate, consisting of cash in the bank, mortgages, stocks, and shares in different companies, and whatever other securities there may be, with interest thereon, to my husband James Innes, less the sums already mentioned in my will. It is my desire that of this residue be set apart the sum of \$5,000 for the promotion of some religious, philanthropic, or charitable object, which shall bear his name. The condition of this bequest is that he set apart a like sum of his own money for a like object, and in the event of him not doing so, then he to have the use of the \$5,000 along with the rest of my estate, with the interest thereof, during his life, and at his death what remains of my estate to be equally divided between my sisters and brothers, Mrs. Jane Alexander, Mrs. Isabella Stephen, James Gerard, and James Innes McIntosh, the nephew of my husband, and in the event of their death to their lawful heirs." James Innes survived his wife about four years, but did not set apart a like sum of \$5,000 for the promotion of any religious, etc., object.

C. L. Dunbar, Guelph, for executors and legatee McIntosh.

E. D. Armour, K.C., for the other legatees under the will of Helen Innes.

R. L. McKinnon, Guelph, for legatees under the will of James Innes.

TEETZEL, J., held that James Innes was entitled only to the life enjoyment of the residuary estate, and upon his death the corpus belongs to the four legatees named; that all interest accumulated since the death of the testatrix not expended by James Innes belongs to his estate. Theobald on Wills, 5th ed., p. 430, Brocklebank v. Johnson, 20 Beav. 205. Briggs v. Penny, 3 DeG. & Sm. 525. Am. & Eng. Encyc. of Law, 1st ed., vol. 29, p. 369, referred to. Order accordingly. Costs of all parties out of the Helen Innes estate.

BOYD, C.

NOVEMBER 5TH, 1903.

WEEKLY COURT.

TORONTO GENERAL TRUSTS CORPORATION v.
CENTRAL ONTARIO R. W. CO.

Railway—Mortgage on Undertaking—Bonds—Interest Coupons—Arrears—Real Property Limitation Act—Application of.

Appeal by defendants Blackstock and Weddell from a certificate of a local Master shewing his finding that defendant S. J. Ritchie is entitled to more than six years' arrears of interest on bonds as against the lands of defendant railway company.

G. T. Blackstock, K.C., and T. P. Galt, for appellants.

J. H. Moss, for defendant Ritchie.

D. L. McCarthy, for plaintiffs.

BOYD, C.—The provisions of R. S. O. 1897 ch. 133, secs. 17 and 24, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds which are secured by mortgage deeds of trust. The land contemplated by the statute is a very different thing from the railway undertaking upon which the interest is secured. That undertaking is an integral, indivisible property consisting of land, chattels, and franchises, which for the satisfaction of creditors or bondholders must be dealt with or sold in its entirety: *Redfield v. Corporation of Wickham*, 13 App. Cas. 467, 476-7. The remedy sought is not by way of action or distress as specified in sec. 17, but is claimed under special provisions which pertain to this railway. Default has been made in the payment of the principal money of the bonds, and the plaintiffs as trustees have proceeded under the 3rd provision of the statutory mortgage to enforce payment of the principal and interest unpaid thereon. All the bondholders are subject to and bound by the terms of this instrument, and the proceeding is for the common benefit of all. The very trust which is to be observed in the case of default is that the trustees are to take possession by a receiver, which has been done, and then to proceed to realize by sale, as has been determined in this case. The extended directions given in the 2nd provision of the mortgage, when default has been made in payment of the interest, provide for the payment of all due and unpaid upon the bonds. That is also the necessary import of the 3rd provision, and it is repugnant to any idea that only six years' interest

is to be recovered on the coupons. These are in effect documents under seal; the bond under seal covenants for the payment of the coupons, and they partake of the nature of a specialty, and are good for at least 20 years: *The City v. Lamson*, 9 Wall. 477; *City of Lexington v. Butler*, 14 Wall. 282, 297. It would be incongruous to find that the coupons are statute-barred as to the realty part of the undertaking and yet exigible as to the personalty part. The security cannot be thus divided.

Appeal dismissed with costs.

BOYD, C.

NOVEMBER 5TH, 1903.

WEEKLY COURT.

FORBES v. GRIMSBY PUBLIC SCHOOL BOARD.

Public Schools—Purchase of Site and Erection of School Building—Funds Provided by Council—Proceeds of old Site and Building—Title to Land Purchased—Expropriation—Agreement with Tenant for Life.

Motion by plaintiff to continue injunction granted by local Judge at St. Catharines restraining defendants the corporation of the village of Grimsby from paying over to defendant school board \$12,500 for the purchase of a school site and the erection of a school building thereon, and restraining defendant school board from proceeding with the purchase of a site known as the Kerr property, and restraining defendant Lysit from proceeding with any work in connection with his contract with the board for the erection of a school building, and restraining defendant Vandyke, as chairman of the building committee of the board, from authorizing any further work in connexion with the contract.

A. H. Marsh, K.C., and C. H. Pettit, Grimsby, for plaintiff.

G. Lynch-Staunton, K.C., for defendants.

BOYD, C.—In my opinion the injunction should not be continued. *Smith v. Fort William*, 24 O. R. 372, decides that school trustees should not undertake to build in excess of funds provided by the council, and that is a salutary rule which need not be invaded in this case. The school board are not restricted to the debentures voted by the council under sec. 76 of the Public Schools Act, 1901, but may also turn in the

other moneys they have under control in the shape of rent and the proceeds of the old school house and site. By the figures submitted there is a considerable margin between the contemplated outlay as tendered for and the funds available under the contract or in the hands of defendants. It is not necessary to exceed what is thus provided, and defendants swear they will keep the work within what they have means to pay for. The Court should not lightly disturb the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality. The objection that there is not a good title to the new site should not prevail. There is power to expropriate, and, apart from that, the agreement for sale and possession has been made with the tenant for life, and that is one that controls the remainderman under the provisions of the School Act, sec. 39: *Young v. Midland R. W. Co.*, 22 S. C. R. 190.

Injunction dissolved and costs reserved till the hearing or further order.

BRITTON, J.

NOVEMBER 6TH, 1903.

CHAMBERS.

RE TOMLINSON v. HUNTER.

Division Court—Jurisdiction—Attachment of Debts—Surplus in Hands of Bailiff of Chattel Mortgagee after Seizure and Sale—Attachment by Mortgagee—Prohibition.

Motion by defendant for prohibition to the 1st Division Court in the county of Carleton. Plaintiff held a chattel mortgage dated 6th January, 1903, for \$1,105.31 made by defendant, payable on 31st March, 1903. Default was made in payment, and on 6th April plaintiff authorized one McDermott as bailiff to seize and sell the chattels covered by the mortgage. This was done, and enough was realized to satisfy the mortgage and all costs, and leave a surplus of \$81.84 in the bailiff's hands. The plaintiff alleged that defendant was indebted to him for rent and upon other claims outside of the chattel mortgage, and on 30th April he began this action in the Division Court against defendant for the amount of the debt and against the bailiff as garnishee to get the \$81.84.

W. H. Barry, Ottawa, for defendant, contended that this money in the hands of the garnishee, upon the undisputed facts, was not a debt, and so the Division Court had no jurisdiction to award it against the garnishee.

W. Wyld, Ottawa, and John Hodgins, Ottawa, for plaintiff.

BRITTON, J.—The question of debt or no debt was one for the determination of the Judge in the inferior Court. The money in the hands of the garnishee is a surplus which, by the terms of the chattel mortgage, is to be paid to defendant, and is money for which, if not paid over, defendant could maintain an action. No doubt, plaintiff would be responsible to defendant for this surplus, as the garnishee was plaintiff's bailiff; but even so, it is the money of defendant and can be attached. *Evans v. Wright*, 2 H. & N. 527, distinguished. *Davenport v. McChesney*, 86 N. Y. App. 242, referred to. As the garnishee has not paid over the money to plaintiff (for payment to defendant), and as defendant has taken no steps against either plaintiff or garnishee for an account, defendant could have an action against the garnishee, and if so, the claim is a debt and can be attached under sec. 179 of the Division Courts Act. See cases cited in *Bicknell & Seager*, 2nd ed., pp. 321, 322.

Motion refused with costs.

NOVEMBER 6TH, 1903.

DIVISIONAL COURT.

OTTAWA ELECTRIC CO v. BIRKS.

Contract—Supply of Electrical Energy—Implied Contract to Take whole Supply—Breach—Construction.

Appeal by defendants from judgment of County Court of Carleton in favour of plaintiffs and cross-appeal by plaintiffs to increase the damages awarded. Action to recover damages for an alleged breach by the defendants of a contract between the parties of 22nd May, 1901, for the supply by plaintiffs of electrical energy to the premises in Ottawa in which defendants carried on their business. The agreement provided that it should remain in force for one year, and thereafter from year to year until terminated by either party giving to the other ten days' notice in writing previous to the expiration of the then current year. The breach alleged was that the defendants, on 6th September, 1902, and while the contract was subsisting, cut the connection between the electric wiring of their premises and the line of the plaintiffs by which the electric energy was supplied, and thereby prevented the plaintiffs thereafter supplying electrical energy to the premises, and refused to accept electrical energy from plaintiffs, and had since taken it from another company.

Glyn Osler, Ottawa, for defendants.

G. F. Henderson, Ottawa, for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that defendants did not agree to do more than to pay according to the schedule of rates indorsed on the back of the agreement for the electrical energy supplied by plaintiffs, which was to be determined *prima facie* by the register of the meter or indicator used for measuring the quantity supplied, unless the price of the quantity supplied in the year, after adding meter rent and deducting the discount allowed, should be less than \$12, in which case the obligation of the defendants was to pay \$12 for the supply of the year. There was no agreement on the part of defendants to use and pay for the whole or any part of the supply which plaintiffs undertook to furnish, but only to pay for so much of it as should be used by defendants as shewn by the meter, unless at the contract rates the amount payable for what was used should be less than \$12, and in that case the agreement of the defendants was to pay \$12. A term not expressed in the contract ought not to be implied unless there arises, from the language of the contract itself and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied: *Hamblyn v. Wood*, [1891] 2 Q. B. 488. Looking at the contract in a reasonable and business way, there is no necessary implication that both parties contemplated an undertaking by defendants that, if they used electricity for lighting their premises, they would take their whole supply from plaintiffs, or even that they would take their supply to the extent of what should be used by 125 incandescent lamps of 16 candle-power.

Appeal allowed with costs and action dismissed with costs.
Cross-appeal dismissed without costs.

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BRITTON, J.

NOVEMBER 7TH, 1903.

WEEKLY COURT.

RE PAKENHAM PORK PACKING CO.

Company—Winding-up—Action for Calls before Winding-up Order—Counterclaim for Rescission of Application for Shares—Application for Leave to Proceed—Jurisdiction of Referee in Winding-up Proceedings.

Appeal by William Gorrell from order of J. A. McAndrew, an official referee, before whom a reference for the winding-up of the company was pending, refusing an application by the appellant for an order directing that a certain action brought by the company (before the winding-up order) against the appellant and the appellant's counterclaim therein against the company be proceeded with notwithstanding the winding-up order.

George Bell, for the appellant.

S. B. Woods, for the liquidator.

BRITTON, J.—The action was for the unpaid calls upon 14 shares of preference stock and 7 shares of common stock. The counterclaim asked that Gorrell's application for the stock be cancelled and rescinded, on the ground of misrepresentations and of false and fraudulent statements in the prospectus, etc., on which statements Gorrell said he relied.

Issue was joined on the 29th April, 1903. On the 16th June, 1903, the winding-up order was made. On the 26th September Gorrell applied to the referee for leave to proceed in the action, pursuant to sec. 16 of the Winding-up Act, R. S. C. ch. 129.

This leave was refused on the ground that an appointment had been taken out to settle the list of contributories, and that all the defences raised by Gorrell could be dealt with upon the application to place him upon the list of contributories, with a right of appeal as wide as an appeal in an action that had been tried.

If that is the case, the action ought not to be allowed to proceed. There are in all about 16 actions, and if all are allowed to proceed a great delay may ensue and very large expense will be incurred. . . .

This case is, after all, simply whether Gorrell is or is not a contributory. . . .

The referee is, in my opinion, right in thinking that he has complete jurisdiction. The dictum which would on first impression seem to be against that view is that of the Chief Justice in *Re Hess Manufacturing Co.*, 23 S. C. R. 665. He said: "Relief by way of rescission is beyond the jurisdiction of the Master in a winding-up proceeding under the Dominion statute." I think the learned Chief Justice did not intend to go so far as to say that the Master had not jurisdiction to declare rescission to the extent of removing a name from the list of contributories, or, in other words, to give effect to a defence, if proved, of fraud in procuring the signature of a person to a subscription for shares. The Master has no authority to grant substantive relief such as might be claimed by counterclaim, or to rescind in the case of a sale by a promoter, or to give the consequential relief which in some cases rescission would involve.

The appellant, having resisted the claim for calls, and having put in his defence and counterclaim before the winding-up order, is not too late to insist upon the same defence now, if he can establish it: see *Whiteley's case*, [1900] 1 Ch. 365.

In view of what is said in the *Hess case*. I add that if the appellant shall not be able, by reason only of want of jurisdiction of the official referee, to avail himself of as full defence before said official referee as in the action, the present application and my decision thereon shall not stand in the way of, nor prejudice the appellant in, a future application.

Appeal dismissed. Costs reserved until after determination of question of appellant's liability.

BOYD, C.

NOVEMBER 9TH, 1903.

CHAMBERS.

RE OLIVER AND BAY OF QUINTE R. W. CO.

Costs—Railway—Expropriation of Land—Abandonment.

Motion by landowner and mortgagee for an order for taxation and payment of costs of proceedings for expropriation, which, the applicants alleged, were abandoned by the company.

A. H. Marsh, K.C., for applicants.

W. E. Middleton, for company.

BOYD, C., held, applying and following *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 234, that the word "desist" in C. S. C. ch. 66, sec. 11, sub-sec. 6, has the same meaning as "abandon" in 51 Vict. ch. 29, sec. 158, i.e., to leave off or discontinue. Whether voluntarily or compulsorily makes no difference, if the company cease operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, which involves the company in paying costs to the landowner.

Order made referring the costs for taxation to a taxing officer. Costs of application to be paid by company.

BOYD, C.

NOVEMBER 9TH, 1903.

CHAMBERS.

TAYLOR v. TAYLOR.

Writ of Summons—Substituted Service—Motion by Person Served to Set aside—Status of Applicant—Solicitor—Communication with Defendant—Notice—Inference—Costs.

Appeal by a solicitor who was served by substitution for defendant with the writ of summons, from order of Master in Chambers (ante 921) dismissing the appellant's application to set aside the order for substitutional service and the service upon the appellant, upon the ground that appellant had no status to apply.

W. J. Elliott, for appellant.

H. D. Gamble, for plaintiff.

BOYD, C.—In this case the solicitor might have contented himself with sending back the copy of writ served and calling

attention to the fact that he was not acting for or in communication with the defendant, as was done in *Watt v. Barnett*, 3 Q. B. D. 184; or he might have moved as an officer of the Court to advise the Court that an error had been committed in ordering service upon him as the defendant's solicitor, as was done in *The Pomerania*, 4 P. D. 195. And, even if not an officer of the Court, I think it is competent for a person served as agent of defendant to move the Court to set aside the service if he is not an agent: *Doremus v. Kennedy*, 2 Gr. 657.

But here the motion is by the solicitor acting for the defendant; he swears that he applies on the defendant's behalf, and the motion is made "on behalf of the above defendant." He, as solicitor acting for the defendant, has no *locus standi* because that implies that he is in communication with the defendant and has the right, or has been instructed, to represent him. Instead of applying as *amicus curiæ*, he applies as agent of the defendant. The Court will not set aside substitutional service if it appears, or can fairly be inferred, that the defendant has notice of what was going on. Such notice is here to be inferred from the form of the application and of the affidavits, as well as from the fact that a person called Taylor was making some inquiries about this motion during its pendency.

Altogether I think it best to affirm the Master's conclusion not to disturb the order for substitutional service, and let the plaintiff proceed at his own risk.

No costs of application or appeal to either party.

BOYD, C.

NOVEMBER 9TH, 1903.

CHAMBERS.

RE OGLE.

Infant—Custody—Rights of Father—Agreement with Uncle—Costs.

Motion by Abraham Stirling, the uncle of Goldie Florence Ogle, an infant of eight years, on the return of a *habeas corpus* and on petition, for an order as to the custody of the infant, who was handed over when a year old to the applicant by the father under a written agreement. The father afterwards took possession of the child.

D. L. McCarthy, for applicant.

J. J. Warren, for the father.

BOYD, C., held that the articles of agreement as to the custody of the child being put an end to by mutual agreement and delivered up on 17th September, 1903, it was not necessary to deal with the rights of the applicant. The infant has come to the hands of her father, who is willing and able to keep her in a suitable manner, and his right is superior to that of the uncle, whose guardianship has been determined. It is impossible, on the conflicting affidavits, to draw any conclusion as to the welfare of the child. There is not enough evidence to induce any interference, and no such case is suggested as would warrant incurring further expense by a reference to the Master. Having regard to the fact that the child has been left in the hands of the uncle since 11th November, 1897, and has been maintained at his charge without contribution from the father, there should be no costs. Application dismissed without costs.

BOYD, C.

NOVEMBER 9TH, 1903.

CHAMBERS.

BASTEDO v. SIMMONS.

Costs—Scale of — Jurisdiction of County Courts — Amount Liquidated or Ascertained.

Appeal by plaintiffs from ruling of one of the taxing officers that plaintiffs were entitled only to costs on the County Court scale and defendants to a set-off of costs. Action for the price of a number of furs sold to defendants. Judgment was given by the trial Judge (MEREDITH, C.J.) for plaintiffs for \$286 (2 O. W. R. 866). The question was whether the amount was ascertained by the act of the parties.

R. McKay, for plaintiffs.

S. B. Woods, for defendants.

BOYD, C.—The cases appear to be in confusion as to the construction and meaning of the words “liquidated or ascertained” in the County Courts Act, R. S. O. ch. 55, sec. 23 (2), and none the less confusing when the cases on the meaning of the like word “ascertained” in the Division Courts Act, R. S. O. ch. 60, sec. 72 (d), are brought into contrast.*

The taxing officer, having proceeded upon the exposition of the law as given in *Ostrom v. Benjamin*, 21 A. R. 467, should not be disturbed in his ruling.

It may be that the Chief Justice will consider the question of granting a certificate to prevent set-off of costs, if applied to.

TEETZEL, J.

NOVEMBER 9TH, 1903.

WEEKLY COURT.

NELSON v. NELSON.

Costs — Mortgage Action — Redemption — Costs of Appeal in Former Action — Attempt to Add to Claim — Dismissal without Costs — Effect of.

Appeal by defendant Isabella Gibson from a part of the report of the Master at Stratford allowing plaintiff \$464.11, being the costs incurred by him in opposing an appeal to the Supreme Court of Canada. The action was for foreclosure of a mortgage, and defendant was entitled to redeem. The appeal to the Supreme Court was by defendant from judgment of Court of Appeal dismissing action by her against plaintiff to redeem the mortgage in question, and also from the judgment of the Court of Appeal reversing an order of ROSE, J., staying proceedings in this action. The Supreme Court dismissed the appeal without costs.

J. P. Mabee, K.C., for appellant.

J. Idington, K.C., for plaintiff.

TEETZEL, J.— . . . The general rule is, that, besides the costs of the suit in which the mortgagee's rights are immediately adjusted as between himself and the owner of the equity, he has also a right to be allowed out of the mortgaged property all costs and expenses reasonably and properly incurred in ascertaining, asserting, or defending his rights, or in recovering the mortgage debt: Fisher's Law of Mortgages, 5th ed., p. 894 et seq.; Seton on Decrees, 6th ed., p. 1953, and cases there cited. . . . In dismissing the appeal to the Supreme Court the Chief Justice said: "Both the appellant and respondent appear to us to have been during the whole course of their dealings in the matter in dispute unreasonably endeavouring to multiply the proceedings and prolong the litigation." . . . In my opinion, the effect of the judgment was not only to deprive plaintiff of the personal remedy for these costs, but of the right to add them to his mortgage debt against defendant.

Appeal allowed with costs and report amended accordingly.

BOYD, C.

NOVEMBER 9TH, 1903.

WEEKLY COURT.

CHITTICK v. LOWERY.

Vendor and Purchaser—Acquisition of Equity of Redemption by Execution Creditor Purchasing at Sale under Execution — Sale of Equity to Mortgagor — Release of all Claims—Effect of—Short Forms Act—Unsatisfied Judgment against Mortgagor—Execution Subsequently Placed in Sheriff's Hands—Subsisting Incumbrance.

Appeal by one Stovel, made a party in the Master's office. from the report of the local Master at Barrie disallowing the claim of plaintiff as a subsequent incumbrancer by virtue of an assignment of a judgment and execution. Under an execution in the case of Hawthorn v. Lowery, the sheriff sold the equity of redemption of Lowery in mortgaged lands on 14th August, 1896, and a conveyance thereof was made by the sheriff to the purchaser, McGibbon, on 25th August, 1896, for \$100. McGibbon was then the assignee of the judgment, and as purchaser he held this interest in the land till 23rd September, 1897, when he sold it to Lowery, the mortgagor, for \$50, and made to him the usual short form conveyance under R. S. O. ch. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd August, 1899, but was not then renewed. McGibbon assigned the judgment (so paid in part) on 22nd April, 1902, to Stovel, and thereafter an alias writ of fi. fa. lands was issued on 3rd July, 1902, and placed in the hands of the sheriff, and in respect of this execution Hawthorn and Stovel were made parties. The Master held that the release of all claims in the short form deed from McGibbon to Lowery operated to discharge the land from this judgment and execution.

J. Bicknell, K.C., for appellant.

C. E. Hewson, K.C., for defendant Lowery and subsequent mortgagees.

D. L. McCarthy, for plaintiff.

BOYD, C.—When the equity of redemption was sold and conveyed by the sheriff, the judgment was satisfied pro tanto, and the equitable interest in the mortgaged premises became vested in the execution and judgment creditor as owner. The land was no longer affected by that judgment and execution,

as it had passed from the ownership of the mortgagee to that of the creditor. So matters remained till the sale and conveyance of McGibbon to the mortgagor Lowery, a year afterwards. The effect of this was to invest the mortgagor with a new interest in the land as conveyed to him by the sheriff's purchaser. That new interest (apart from the covenants of the short forms deed) would fall under the operation of the writ against lands, which was still in the sheriff's hands till August, 1899. On the non-renewal of the writ, the equitable estate held by Lowery would be exempt from the execution, till there was placed in the sheriff's hands the alias writ of 1902, as to the effect of which the contest arises.

The covenants relied upon are No. 4, as to incumbrances, and No. 8, as to the release of all claims. Now, when the land was in the hands of McGibbon, it was not subject to any incumbrances by reason of this judgment and execution. It did become subject to the execution issued by or for Stovel in 1902, which would rank in priority only from that date. There was nothing affecting the land in the mere judgment till execution against lands issued thereon. The writ left in the sheriff's hands till 1899 was spent by non-renewal and may be left out of the case. All claims possessed by McGibbon on the equitable estate were conveyed by him when he made the conveyance. It was not till after the conveyance to the mortgagor that this claim under the execution became possible; and then the claim arises by operation of law for the satisfaction of a judgment debt (still unpaid by Lowery) out of the new estate acquired by him from the sheriff's purchaser.

I do not read the expansion of No. 4 as embracing a judgment or execution obtained or issued by the grantor, but rather one which affects the lands in contravention of his absolute ownership, i.e., one issued or enforceable against the lands in his hands, and one which as against his vendee he ought to pay.

As to the unique provision No. 8, it has its origin in the abortive legislation of Lord Brougham in the English Short Forms Act of 1845 (8 & 9 Vict. ch. 119, Imp.), which, after remaining in disuse for many years, was finally repealed in 1881 by sec. 71 of the Conveyancing Act of that year. It is not commented on in the books, and there have been, I believe, no cases on the provision for the "release of all claims on the lands" either in England or in this Province, where it was introduced in 1846 (9 Vict. ch. 6, C.). But I take it not to be applicable to this transaction. The protection afforded by the release clause is as against all claims which the

purchaser would not have to pay or meet but for the ownership of the land. The clause applies to claims on the land which it is and was the duty of the vendor to remove in order to assure the purchaser a complete title at the date of conveyance. But such title was conveyed to the purchaser by the vendor. There was nothing outstanding which affected or could or might affect the lands or the purchaser in respect of the lands, as and when the conveyance was made to the purchaser, in respect of the unsatisfied judgment and possible execution upon it; but it was the duty of the purchaser to pay that judgment, and it was not part of the bargain that the vendor was to discharge his claims in respect of that unpaid judgment—nor does the general release extend to it. It would be a misuser of the release clause were the purchaser to be thereby absolved from paying the balance due on the judgment, and if he is not free from the incidence of the judgment, why should the land be freed from the effect of an execution issued upon that judgment in regard to the newly acquired estate? The judgment is the principal thing, and the execution is its accessory and legal incident.

All claims of the plaintiff as to the land have been conveyed and released to the purchaser; what has not been released is his claim upon the unsatisfied judgment: *Barrow v. Gray*, Cro. Eliz. 552.

Appeal allowed. Costs to appellant to be added to his claim.

BOYD, C.

NOVEMBER 9TH, 1903.

WEEKLY COURT.

GURNEY FOUNDRY CO. v. EMMETT.

Trade Union — Interference with Employers' Business — Injunction — Action against Members of Union — Parties — Representation — Local Bodies — General Council.

Motion by plaintiffs for an injunction against the members of the Ironmoulders' Union to restrain them from injuring the plaintiffs' business by interfering with workmen, etc.; and for an order authorizing defendants to represent the other members.

E. E. A. DuVernet, for plaintiffs.

J. G. O'Donoghue, for defendants.

BOYD, C.—An order should go restraining defendants from issuing and publishing the placards, posters, and printed

matter complained of, or any like productions, till the trial or further order. I say nothing as to the other branches of relief sought, as the evidence is not complete on the part of defendants, who did not argue on the merits, and it is possible they may be helped by the examination of plaintiffs. But the immense volume of viva voce examinations already before the Court should not be increased unless the parties propose to have the case tried on this motion. Order to go for representation of the various local orders or bodies whose heads are now defendants, but not as to the Trades Council, Costs in cause, if not otherwise ordered at the trial. This order to be without prejudice to the prosecution of other parts of plaintiffs' motion after the evidence has been made complete on both sides, if the parties are so advised.

BOYD, C.

NOVEMBER 9TH, 1903.

TRIAL.

SMITH v. GORDON.

Sale of Goods — Cordwood — Measurement — Tender — Insufficiency — Resale — Privity — Estoppel — Contract — Setting apart Wood — Scale of Costs.

Action for an injunction restraining defendants from removing any or all of the cordwood at Christie's Pit on the Canada Atlantic Railway, for a declaration that the cordwood is the property of plaintiffs, and against defendant Gordon for \$1,000 damages for breach of contract.

J. A. Macdonell, K.C., for plaintiffs.

G. McLaurin, Ottawa, for defendants.

BOYD, C.—The case of the plaintiffs rests on the sufficiency of the tender made on or about 2nd April, 1903, of \$873, which it is argued was the price of all the wood then piled at the Christie Pit and sold to the plaintiffs by the defendant Gordon. That is based on the evidence of a mutual measurement and settlement of the quantity there as 355 cords, less six per cent., 334 cords in all. But I think the result of all the evidence is, that there was a mistake in these figures, and that this quantity was not accepted by the defendant as correct. The error in computation of the plaintiffs' scaler is proved, and both men who measured agree in the actual and correct result as being a total of 382 cords. So that I find the amount tendered was insufficient, and the defendants were justified in going on to sell again after due notice given to

the plaintiffs. There was an arrangement to allow something for unfitness and bad wood, and I think the fair amount of wood of merchantable quality was 380 cords, at which it was measured by the purchaser Barrett.

The sale to Barrett was had with the privity of the plaintiff Smith, and I think the plaintiffs are thereby estopped from making objection. On this sale there was a loss of 45 cents a cord, 380 cords, equal to\$171 00

I allow discount on Barrett's notes 17 70

And expenses properly incurred by plaintiffs on
and about the resale at 62 30

251 00

Add 201 cords delivered to defendants 703 50

\$954 50

which, being deducted from \$1,000 paid by plaintiffs, leaves in their favour a balance of \$45.50 to be paid by defendants to plaintiffs.

There was no setting apart of any wood to answer for \$1,000 paid. The contract says "party of first part can own wood to value of all money paid in advance," but this imports some transaction by which an appropriate part should be designated on the ground.

The defendants should have accepted the offer of the plaintiffs to settle on the basis of the accounts as I now find them, which was practically offered in the letter of 6th April, and have avoided litigation.

I give plaintiffs costs on County Court scale and judgment for \$45.50.

NOVEMBER 9TH, 1903.

DIVISIONAL COURT.

RE WARBRICK AND RUTHERFORD.

Landlord and Tenant—Overholding Tenants Act—Proceedings under—Motion for Prohibition or Certiorari—No Writ of Possession Issued—Exclusive Remedy under sec. 6.

Appeal by Rutherford, the tenant, under the Overholding Tenants Act, R. S. O. ch. 171, from order of MACMAHON, J. (2 O. W. R. 609) refusing appellant's application for an order under sec. 6 of that Act commanding the Judge of the County

Court of Peel to send up the proceedings into the High Court, and prohibiting the Judge and the sheriff from taking any further proceedings under an order made by the Judge for a writ of possession to issue to place the landlord in possession. No writ of possession had been issued.

The appeal was heard by STREET, J., BRITTON, J.

R. McKay, for appellant, contended that the ordinary right to certiorari and prohibition in respect of proceedings under the Act is not interfered with by the special provisions contained in sec. 6.

W. T. J. Lee, for landlord.

STREET, J., was of opinion that sec. 6 was intended as the means, and the only means, by which the tenant may have the proceedings taken by his landlord removed into the High Court and examined there. If the Court were to hold that a tenant could have the proceedings removed before the writ issued, it would open a door for delays which it was the object of the Act to prevent.

BRITTON, J., without going so far as to hold that sec. 6 is the only means by which the proceedings may be removed, held that sec. 6 amply protects the tenant, and the applicant is not entitled *ex debito justitiæ* to certiorari.

Appeal dismissed with costs.

BRITTON, J.

NOVEMBER 10TH, 1903.

CHAMBERS.

RE ROWE.

Criminal Law—Extradition—Fugitive Offenders Act—Forgery—Theft—Evidence—Prima Facie Case—Presumption—Identification of Prisoner—Judicial Notice of Statute.

Application under R. S. C. ch. 143, for the discharge from custody of Anthony Stanley Rowe. By the return to the writ of habeas corpus it appeared that the prisoner, having been apprehended under the Fugitive Offenders Act, had been committed to prison to await his being conveyed to London, England, for trial upon charges made against him. There were three warrants of committal: (1) On the ground of his being accused of forging and uttering knowing to be forged certain orders for payment of money with intent to defraud, as follows: on the 26th September, 1902, a banker's cheque for

£3,125; on 15th October, 1902, a banker's cheque for £4,666 3s. 8d.; on 24th November, 1902, a banker's cheque for £2,022 14s. 1d. (2) On the ground of his being accused as the servant of "The Great Fingal Consolidated Limited," of stealing valuable securities belonging to that company, the securities being the cheques above mentioned. (3) On the ground of his being accused as a public officer of "The Great Fingal Consolidated Limited" of unlawfully taking to and for his own use and benefit the cheques mentioned. These warrants were sent to Canada. The prisoner was arrested at Toronto and brought before the police magistrate for that city. The question was, whether or not there was produced before the magistrate such evidence, subject to the provisions of R. S. C. ch. 143, according to law as ordinarily administered by the magistrate, as raised a strong or probable presumption that the prisoner (a fugitive under the Act) committed the offence mentioned in any of the warrants, and that the offence was one to which the Act applied.

T. C. Robinette, K.C., for prisoner.

J. R. Cartwright, K.C., and J. W. Curry, for the Crown.

C. W. Kerr, for the prosecutors.

BRITTON, J.—The evidence of one Bartholomew was distinct upon the following points. That the prisoner was secretary to "The Great Fingal Consolidated Limited," and acted as such until the 28th December, 1902, when he absconded from England. That the bankers of that company were Robert Lubbock & Co., of Lombard street, London. That the company had two accounts with Robert Lubbock & Co., one of which accounts was for the payment of dividend No. 5 of the company, and was called dividend No. 5 account. That the warrants for dividends could be signed by prisoner alone as secretary of the company, and a cheque so signed would be honoured when funds sufficient were to the credit of the company. That prisoner, having become possessed of two cheques drawn by Vivian, Younge, & Bond in favour of the company, which ought to have been paid for the company to the Union Bank of Australia, deposited these cheques to the company's credit in dividend No. 5 account with Robert Lubbock & Co. That prisoner had no power to draw money from the Union Bank of Australia upon the company's cheque signed by himself. That the two cheques so deposited to the credit of dividend No. 5-account amounted together to £4,606 3s. 8d. That a dividend warrant or cheque for £4,606 3s. 8d., being the one stated in the warrants of committal, was drawn

by the prisoner in favour of Bewick, Moering, & Co. That the indorsement of Bewick, Moering, & Co. is in the handwriting of the prisoner. That the cheque so indorsed was put to prisoner's credit in the London Joint Stock Bank, Limited. A similar account was given of the £2,022 14s. 1d. cheque or dividend warrant, which was produced. The cheque for £3,125 was produced before the magistrate in London, but it was deposed to that a sum of £3,125 was charged by Robert Lubbock & Co. as paid to the company on the 26th September, 1902, and on the same day the prisoner's account at the London Joint Stock Bank was credited with £3,135.

A *prima facie* case of stealing at least two of these dividend cheques has been made. It may be that a stronger *prima facie* case is made for the stealing of the large sums represented by these cheques, but even as to the cheques they were the property of the company, valueless until signed, but when signed by the prisoner, of value, and could only be properly handed out to persons entitled to receive them in payment for dividends. The prisoner paid them to himself, nominally to a firm of which he was a member, and upon his own indorsement in the name of that firm got the money. That makes a *prima facie* case of theft of the cheques as well as of the money. A *prima facie* case of forgery is also made out. If it is true, as deposed to, that there were no such amounts for dividends payable to Bewick, Moering, & Co., as represented by the dividend warrants, and if the prisoner fraudulently made these warrants for the purpose of transferring the money from dividend No. 5 account to his own pocket, it was forgery.

The evidence of Thomas Edgar Smith fully identifies the prisoner as the person who was charged in London, against whom the warrants were issued, and who is now the fugitive under the Act.

There is raised by the evidence a strong and probable presumption that the prisoner committed the offences, and that the offences are of the kind to which the Fugitive Offenders Act applies. By the Canada Evidence Act, 1893, sec. 7, the magistrate was, and the Judge is, bound to take judicial notice of the Imperial statute.

Motion for discharge refused. Prisoner remanded to custody for return to London, England.

FERGUSON, J.

NOVEMBER 11TH, 1903.

TRIAL.

SMITH v. GRAND ORANGE LODGE OF BRITISH AMERICA.

Life Insurance—Cancellation of Policy—Material Misstatements as to Disease.

Action for a declaration that a certain contract of insurance of plaintiff's life for \$1,000 entered into by defendants is a good, valid, and subsisting contract; to restrain defendants from cancelling the contract; or for damages. The defendants counterclaimed for cancellation of the contract upon the ground that plaintiff made material misrepresentations in his application for the insurance.

H. M. East, for plaintiff.

J. A. Worrell, K.C., for defendants.

FERGUSON, J., found that plaintiff stated that he had not consulted or been attended by a physician for six years next prior to his examination upon the application for insurance, whereas he had consulted four physicians within four months immediately prior thereto. This statement of plaintiff he warranted to be true, and it, amongst other statements, representations, and answers by him, formed the basis of the contract. The statement was made and was not true, and was a material statement. The plaintiff also stated that he had not had any illness except a slight attack of la grippe for three years next prior to his examination, whereas he had been ill for two months immediately prior to his examination, and had consulted two doctors, who told him that he was suffering from, at any rate, anæmia. The statement was not true and was material. The plaintiff concealed symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of the examination. This concealment was in violation of plaintiff's warranty and was material. The plaintiff had phthisis or tuberculosis, which, though undeveloped by physical signs, was existing, and he having warranted that he was free from disease, there was a breach of the warranty, even if he did not know he was diseased. For these reasons the certificate or policy was void and should be delivered up to be cancelled. *Honour v. Equitable Life Assurance Society*, [1900] 1 Ch. 852. and *Connecticut Mutual Life Ins. Co. v. Home Ins. Co.*, 17 Blatch. 142, referred to.

Judgment dismissing the action with costs and for defendants on their counterclaim with costs.

BRITTON, J.

NOVEMBER 12TH, 1903.

TRIAL.

COOK v. TOWN OF COLLINGWOOD.

Way—Non-repair—Open and Unguarded Trench—Injury to Person—Nonfeasance—Statutory Limitation of Action—Time—Liability of Municipal Corporation.

Action for damages by reason of alleged defective highway, tried at Barrie without a jury. The plaintiff, George Cook, on the evening of 2nd December, 1902, between 6 and 7 o'clock, was going to his own house in Collingwood, and in crossing a temporary bridge over a ditch on Hurontario street he stepped off the bridge and fell into a trench made by workmen for the defendants for the purpose of supplying water to a house recently erected in that street, and was injured. Plaintiff alleged that the trench was negligently made and that defendants were guilty of negligence in leaving it unguarded.

L. G. McCarthy, K.C., for plaintiff.

J. Birnie, K.C., for defendants.

BRITTON, J., held, upon the evidence, that plaintiff had not succeeded in shewing that this accident was in any way caused by the negligence of defendants. Even if there were negligence by reason of not guarding the trench, the action would be barred, not having been commenced within 3 months from 2nd December, 1902. See *Pearson v. County of York*, 41 U. C. R. 378.

NOVEMBER 12TH, 1903.

DIVISIONAL COURT.

RE JELLY, UNION TRUST CO. v. GAMON.

Executors and Administrators—Claim against Estate of Deceased Person—Running Account—Entries in Books of Creditor—Corroboration—Statute of Limitations.

Appeal by plaintiffs, the executors of William Jelly, from order of Master in Ordinary in an administration matter, allowing the claim of one Tuck as a creditor. Tuck had been

tenant to the testator of the Royal Hotel in Shelburne under an oral agreement, at \$650 a year from February, 1886, until May, 1901. During that period he had a running account with his landlord, making payments from time to time on account of his rent, and advancing money from time to time on account of rent to his landlord and on various other dealings between them, including the purchase by Tuck from Jelly at the beginning of his tenancy of the stock in hand of liquors and groceries and of the furniture in the hotel. Tuck kept a cash book and ledger in which the cash transactions between him and Jelly were entered by him from day to day. All the larger cash transactions were evidenced by cheques given by Tuck to Jelly, entered regularly in the cash book and produced in evidence. A considerable amount made up of small sums alleged to have been paid in cash by Tuck to Jelly from time to time, and entered in Tuck's books, but not otherwise vouched, was disputed by the executors, but allowed by the Master. The testator kept no books of account or memoranda of his transactions with Tuck. No settlement of accounts between Tuck and the testator had ever been made.

J. Bicknell, K.C., for appellants.

J. H. Moss, for Tuck.

THE COURT (STREET, J., BRITTON, J.) held that the Master, giving credit as he did to the evidence of Tuck in support of his own claim, was justified in holding that the claim was sufficiently corroborated by some other material evidence. It was impossible to exclude from consideration the books of account kept by Tuck, because he was entitled to refer to them to refresh his memory as to the items. The entries in his books were sworn to by him as being correct, and they were vouched in perhaps 100 entries by the production of cheques payable to the testator's order and indorsed by him, and in other cases by oral testimony other than Tuck's own. The general correctness of the books was shewn, therefore, by other material evidence, and the oath of the creditor was sufficiently corroborated to entitle the Master to act upon it: *Green v. McLeod*, 23 A. R. 676.

The account between Tuck and the testator was a running account, with frequent entries in each month from its beginning to its end, and therefore the Statute of Limitations could not apply to any of the items: *Banning on Limitations*, p. 220.

Appeal dismissed with costs.

NOVEMBER 12TH, 1903.

DIVISIONAL COURT.

RE McDONALD.

Will—Construction—Devise—Estate Tail—Vested Remainder in Fee over—Uncertainty—Repugnancy—Absolute Bequest of Personalty.

Appeal by Jane Burke from order of FALCONBRIDGE, C.J., declaring the construction of the will of Charles McDonald. The testator, after directing payment by his executors of all his debts and funeral and testamentary expenses, proceeded as follows:—"I give . . . to my daughter Jane McDonald all my real and personal property that I die possessed of, after the dissolution of the partnership company known as L. McDonald & Co., and after a division is made, and after the following bequests, namely, the maintenance of my wife . . . the amount being for that purpose \$20 in advance every three months during her lifetime, and \$500 to be paid Margaret Streath and to St. Joseph's Union Homeless Child of New York \$100. In the event of my daughter Jane McDonald predeceasing me, or in the event of her dying without heirs, then I direct that all my property left at that time be equally divided between my brothers and sisters."

J. H. Moss, for Jane Burke.

H. J. Wright, for the executors of Charles McDonald.

F. W. Harcourt, for infants.

J. H. Spence, for John and William McDonald.

A. W. Holmested, for executors of Lewis McDonald.

THE COURT (STREET, J., BRITTON, J.) held that Jane McDonald (now Jane Burke) took under her father's will an absolute estate tail in possession in the lands devised, subject to the charges set forth in the will, with a vested remainder in fee over to the brothers and sisters of the testator. Reference to Jarman on Wills, 5th ed., p. 1175.

It was argued for Jane Burke that the gift over being only of "property left at that time," that is to say, at her death, must fail because of its uncertainty, and because of its repugnancy to the prior absolute gift to her, upon the authority of the cases cited in Jarman, 5th ed., p. 333. The Court held, however, that the cases, or the principle upon which they have gone, do not apply to a case where the previous devise is in tail.

With regard to the personalty, it was held that Jane Burke took it absolutely, subject to the charges set forth in the will: Jarman, 5th ed., p. 1366; Hawkins, ed. of 1885, p. 188.

Order accordingly. Costs of the appeal of all persons who properly appeared upon it to be paid out of the estate.

NOVEMBER 12TH, 1903.

DIVISIONAL COURT.

DICKSON v. TOWNSHIP OF HALDIMAND.

Way—Dangerous Condition—Wall and Ditch—Injury to Person—Misfeasance—Want of Guard—Contributory Negligence—Liability of Municipal Corporation.

Appeal by defendants from judgment of BOYD, C., who tried the action without a jury at Cobourg, in favour of plaintiff for \$350 damages. Action for misfeasance in the condition of a highway. There was an open ditch by the side of the road and a stone wall to protect the road; the plaintiff fell against the wall and into the ditch and was injured.

E. C. S. Huycke, K.C., for defendants, contended that the negligence proved, if any, was nonfeasance (the want of a guard), and the action was not brought in time under the Municipal Act; and also contended that there was contributory negligence, the plaintiff having frequently passed the place where he fell and knowing the condition.

W. F. Kerr, Cobourg, for plaintiff, contra.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that the finding of the Chancellor that there was no contributory negligence was well supported by the evidence; that it was not the duty of plaintiff to look for danger at every step, even if he knew the highway was dangerous; that all he was bound to do was to use care proportionate to the danger. The Chancellor found that the cause of the injury was the stone wall, and there was evidence to support that finding. That was clearly misfeasance. The defendants had built a wall which was dangerous and caused the injury. They might have put up a guard, but their not doing so did not make the cause of the injury nonfeasance. The cases of *Rowe v. Corporation of Leeds and Grenville*, 13 C. P. 515, and *Bull v. Mayor of Shoreditch*, 19 Times L. R. 64, governed the case. *Pearson v. County of York*, 41 U. C. R. 378, is not a satisfactory decision, and the others should be preferred. At

present it must be held that an act of misfeasance is not one to which the statutory limit applies, though that is a question which may have to be considered by a higher Court.

CARTWRIGHT, MASTER.

NOVEMBER 13TH, 1903.

CHAMBERS.

RENOUF v. TURNER.

(TWO ACTIONS.)

Security for Costs—Claimants of Fund in Court both out of Ontario—Cross-motion for Security—Stay of Proceedings—Security by Reason of Part of Fund Unclaimed by one Claimant—Consolidation of Actions.

These actions arose out of the death of one Harney, who had two policies for \$1,000 each, one in the Commercial Travellers' Association, and the other in the Commercial Travellers' Mutual Benefit Society. The amounts of these policies had been paid into Court—\$1,940 more or less.

Renouf and Turner were the only claimants to these funds. The former claimed under an instrument dated 16th January, 1899. Turner claimed under a notarial transfer dated 25th March, 1902. Renouf claimed to be entitled to at least \$800. Turner claimed the whole fund.

Both parties were resident in Quebec, and had no assets in Ontario. Renouf made affidavit that he was worth over \$30,000, while Turner was financially worthless. Neither of these allegations was disputed.

In the second action an order was made on 13th October, on application of Turner and on notice to Renouf, requiring the latter to give security for costs.

In the first action Renouf moved for an order requiring Turner to give security for costs and for an order consolidating the issues.

In the same action Turner moved for an order requiring Renouf to give security.

In the second action Renouf moved also for security and consolidation of the issues.

W. M. Douglas, K.C., for Renouf.

C. A. Moss, for Turner.

THE MASTER.—As a preliminary objection to the last motion, Mr. Moss relied on the decision in *Weeks v. Underfeed*, 19 P. R. 299. In that case a Divisional Court held that "an order for security for costs has the effect of staying all pro-

ceedings." By this decision I am clearly bound. Then as to the other motions.

First, as to that requiring Turner to give security in action No. 1.

Mr. Douglas relied on the decision in *Knickerbocker v. Webster*, 17 P. R. 189, and cases therein cited, and followed; also *Sinclair v. Campbell*, 2 O. L. R. 1, and cases there cited by the Chancellor.

On consideration I think that the argument of Mr. Douglas must prevail unless otherwise displaced.

But it was pointed out by Mr. Moss that in this case Renouf has abundant security, inasmuch as there is in Court a fund of nearly \$1,900, of which Renouf only claims about a half.

To this it was replied that, although Renouf and Turner are the only claimants, it does not follow that some other may not appear before the decision of the issues. *Johnston v. Catholic Mutual Benefit Society*, 24 A. R. 88, was cited as shewing that possibly legatees or next of kin might come in yet, and that neither claimant might be entitled to any part of the fund in Court. I think, however, that it will be time enough to consider this when any rival claimant appears. In the meantime there are only two claimants. If any cause is shewn later, the motion can be renewed.

The orders to be made now will, therefore, be as follows:—

The motions in the first action must be dismissed with costs to Turner in any event. The motion in the second action by Renouf to consolidate will also be dismissed with costs to Turner in the issue. And in the same action the two motions for security for costs will be reserved to be disposed of when the claimant Renouf has complied with the order for security, which he is to do not later than 16th instant. At the same time the motions for consolidation can be renewed. If granted, the motions for security will be unnecessary in all probability.

OSLER, J.A.

NOVEMBER 13TH. 1903.

CHAMBERS.

ROBERTS v. CAUGHELL.

*Mortgage — Foreclosure — Final Order after Abortive Sale —
New Day — Rule 393 — Time for Redemption.*

Appeal by defendant from order of Master in Chambers,
ante 939.

The appeal was heard by OSLER, J.A., holding Chambers for a Judge of the High Court.

E. Meek, for appellant.

F. E. Hodgins, K.C., for plaintiff.

OSLER, J.A., dismissed the appeal with costs.

OSLER, J.A.

NOVEMBER 13TH, 1903.

CHAMBERS.

MCDONALD v. PARK.

Venue—Change of—Substantial Grounds—Preponderance of Convenience—Cause of Action—Residence of Parties—Witnesses—Expenses.

Appeal by plaintiff from order of Master in Chambers, ante 812, changing the venue from Toronto to Chatham.

The appeal was heard by OSLER, J.A., sitting for a Judge of the High Court.

Casey Wood, for appellant.

W. E. Middleton and C. A. Moss, for defendants.

OSLER, J.A., affirmed the Master's order, holding that the decided cases have not forbidden a change of venue in a proper case; that each case must be judged by its own facts; and that this was eminently a case for trial at Chatham.

BRITTON, J.

NOVEMBER 13TH, 1903.

TRIAL.

• THORNTON v. THORNTON.

Master and Servant—Wages—Claim against Estate of Brother—Evidence—Corroboration—Claim against Brother's Widow—Amount of Wages—Costs of Action.

Plaintiff was the brother of Henry M. Thornton, who died on the 28th July, 1899, and who in his lifetime kept the Queen's hotel, Orillia. The action was brought against Henry M. Thornton's widow to recover wages for plaintiff's services as bar tender, from 15th February, 1898, to 28th July, 1899, against the defendant as administratrix of her husband's estate, at \$10 a week, and from 28th July, 1899, to 1st December, 1900, against the defendant personally, at \$12 a week.

F. E. Hodgins, K.C., and G. D. Grant, Orillia, for plaintiff.

R. D. Gunn, K.C., for defendant.

BRITTON, J.—The plaintiff for some time prior to the 15th February, 1898, was the owner of or interested in this hotel at Orillia, and his brother Henry M. Thornton kept a hotel at Atherly.

The plaintiff is an unmarried man, and was in the habit of working for wages, but apparently he was not, and is not, a man careful about making bargains or about saving money. It is not pretended that he went to his brother's in Orillia as the result of any distinct bargain, but he says his brother paid him small sums occasionally, and that his brother said he would treat him, the plaintiff, fairly and right.

That is not enough, upon the facts in this case, as against the deceased brother's estate, to make out a promise to pay. It may well be that the deceased thought in giving the plaintiff a home and board and occasionally a small sum of money, and allowing plaintiff to go and come as he pleased, he was in fact treating him "fairly and right." The plaintiff has to make out that the deceased was indebted to him. Ordinarily the onus would be shifted by shewing services, from which there would be an implied promise to pay. I have carefully considered the evidence. No doubt some service was rendered, but, upon the evidence, it was not of any such value as claimed by the plaintiff, and it was, in my opinion, rendered under such circumstances as from it a promise to pay would not be implied. It was such a service between brothers that in order to entitle plaintiff to recover he must shew either an express hiring or a promise on the part of the deceased to pay, or what would fairly amount to such a promise, or an intention on the part of the deceased to pay, or at the very least a knowledge on the part of the deceased that the plaintiff was working with the expectation of being paid. Having seen the plaintiff and heard his evidence, I have no hesitation in coming to the conclusion that he was quite willing to remain at his brother's, making that his home, without any bargain and with no expectation that he would be paid wages. This seems to me consistent with his actually getting from time to time small sums of money for clothes and his pleasure. . . . There is plenty of evidence that plaintiff was at his brother's hotel and that he did some work, but there was no corroborative evidence as against the deceased. Even if there was the presumption that the work was to be paid for, I think that presumption is rebutted by the facts in this case. . . . It is important that during the time the plaintiff was at the hotel he made no claim for wages, nor did he ask for a settlement or make any claim after his brother's decease until

shortly before bringing this action. The plaintiff fails against defendant as administratrix.

After the death of Henry M. Thornton the plaintiff continued on, or on and off, at the hotel in the same way as before his brother's death until the autumn of 1899, when defendant was not willing that he should stay longer. The plaintiff when leaving did not ask for wages against defendant personally or from her husband's estate. . . .

In the spring of 1900 . . . the plaintiff returned at the defendant's request. The plaintiff, as against the defendant, is entitled to be paid for his services from March to December, 1900, 36 weeks, but he is not, in my opinion, entitled to any such sum as claimed. His services were not worth so much. It was not within the contemplation of either plaintiff or defendant that any such wages should be paid. . . . I think plaintiff should get \$6 a week and his board, and I allow him that without any deduction for loss of time.

The defendant has paid \$124, leaving a balance of \$92, for which amount plaintiff is entitled to judgment.

Considering the whole case . . . the relationship of the parties, and the circumstances under which plaintiff returned to work for defendant, I think no costs should be allowed to plaintiff, and no costs to defendant as administratrix, and no set-off of costs to defendant individually.

FERGUSON, J.

NOVEMBER 13TH, 1903.

TRIAL.

HOME LIFE ASSOCIATION OF CANADA v. SPENCE.

Mortgage—Covenant for Payment—Subsequent Dealings with Equity of Redemption—Merger—Accord and Satisfaction—Liability—Reference.

On the 6th December, 1900, defendant executed in favour of plaintiffs a mortgage upon his electric plant in the village of Colborne to secure \$3,000 advanced. The mortgage embraced not only the land on which the plant or part of it stood, but also the electric light and power plant, machinery, tools, &c., as a going concern throughout the village of Colborne, and like property which should thereafter be brought upon the premises. The defendant covenanted that he would, until the principal money and interest should be paid, repair and keep in repair, and that he would not sell or allow to be destroyed or removed any of the plant, and would keep and continue the premises as a going concern, &c.

The defendant afterwards sold and transferred the equity of redemption in the premises to Mary M. Coyne, taking a mortgage upon the equity of redemption to secure \$700, part of the purchase money thereof.

Afterwards and on the 1st October, 1901, Mary M. Coyne gave the plaintiffs another mortgage upon the premises to secure the payment of \$550 advanced to her. In this mortgage Mary M. Coyne covenanted, among other things, that she would pay the principal and interest on the former mortgage made by defendant, and that she would perform, abide by, observe, and keep all the covenants, provisoes, and conditions contained in that mortgage.

On the same day an agreement was entered into by Mary M. Coyne and her husband with the plaintiffs, in which she and her husband covenanted, amongst other things, to pay the moneys secured by the mortgage made by defendant.

On the 2nd January, 1902, the plaintiffs obtained consents under seal from Mrs. Coyne and her husband and from the defendant, to the plaintiffs taking possession of the premises. The plaintiffs went into possession of the property, and they alleged that they expended \$5,000 in repairs and improvements thereon.

On the 24th March, 1902, the defendant quit-claimed all his interest in the property to plaintiffs, reserving, however, his rights on the covenant contained in his mortgage from Mary M. Coyne, and on the same day Mary M. Coyne executed in favour of plaintiffs a quit-claim deed of all her interests in the property. This contained a provision that its execution should not operate as a merger.

This action was brought upon the covenant to pay the mortgage money and other covenants and provisoes contained in the mortgage for the \$3,000 made by defendant. The plaintiffs claimed payment of the principal, \$3,000; interest, \$390.04; money paid for insurance, \$116; money properly expended on the premises, \$5,510; paid for running expenses after crediting earnings, \$778.16.

E. E. A. DuVernet, for plaintiffs.

S. B. Woods, for defendant.

FERGUSON, J.:—The defendant contends that he is not liable because, upon the execution of the quit-claim deeds, there was a merger and an extinguishment of the mortgage debt.

shortly before bringing this action. The plaintiff fails to prove defendant as administratrix.

After the death of Henry M. Thornton the plaintiff continued on, or on and off, at the hotel in the same way as before his brother's death until the autumn of 1899. Defendant was not willing that he should stay at the hotel. Plaintiff when leaving did not ask for wages against defendant personally or from her husband's estate.

In the spring of 1900 . . . the plaintiff refused the defendant's request. The plaintiff, as against defendant, is entitled to be paid for his services from December, 1900, 36 weeks, but he is not, in my opinion, entitled to any such sum as claimed. His services were not worth so much. It was not within the contemplation of either plaintiff or defendant that any such sum should be paid. . . . I think plaintiff should get \$124 on the board, and I allow him that without any deduction for time.

The defendant has paid \$124, leaving nothing to be paid for which amount plaintiff is entitled to judgment.

Considering the whole case . . . the merits of the parties, and the circumstances under which plaintiff returned to work for defendant, I think \$124 should be allowed to plaintiff, and no costs to defendant, and no set-off of costs to defendant.

FERGUSON, J.

No

TRIAL.

HOME LIFE ASSOCIATION OF CASHIERS

Mortgage—Covenant for Payment—Subrogation—Equity of Redemption—Merger—Assignment—Liability—Reference.

On the 6th December 1900
of plaintiffs a mortgage
of Colborne to secure
braced not only the
stood, but also the
tools, &c., and the
borne.
upon the
the

NOVEMBER 13TH, 1903.

ELIZABETHTOWN.

*Instance of Provincial
Auditor — Payment
of Department of Provin-
cial—Scale of Costs—Juris-
Ascertainment of Amount*

Amount of auditor's bill, certi-
Auditor, under sec. 16 of R.
ter provision for keeping and
accounts.

A. Stewart, Brockville, for de-

was appointed to make audit
in the absence of any specific
that all prior pre-requisites have
ference is simply denial of all al-
ing him to its proof.

action is premature, because there-
ance of the bill by the Provincial
proved by the Attorney-General,
and thereafter at the office of the
ndants. The proof made was, that
Provincial Municipal Auditor was
to municipality, with a request that
by letter of 4th May. The council
of the amount of the bill on 11th
the papers, report, bill, and letters
meeting to all the members then
to be a sufficient demand to justify
months afterwards on 1st September.
the office of the financial agent of the
to his principals, the municipal
other, was yet more, than the letter
en it appears from the certificate of
hich was allowed to be put in, that the
ment is to act upon a tariff provided
the allowance of the Provincial Muni-
to such tariff is accepted as of

The equity of redemption was at the time in the hands of Mrs. Coyne, and the deed executed by her provides specifically against a merger. The interest that the defendant had at the time was that of a mortgagee upon the equity of redemption, and he provided for the retention of some of his rights and remedies upon his mortgage.

I have considered the matter and examined the cases on the subject, and I have become satisfied that there was not a merger.

Counsel for the defence did not contend so strenuously that there was a merger as that there was (in equity at all events) an accord and satisfaction of the mortgage debt.

In my opinion, there is not evidence upon which I can say that there was an accord and satisfaction. The case, *Forrest v. Gilson*, 6 Man. L. R. 612, so much relied upon, does not apply at all, as I think. That case was decided upon demurrer. The accord and satisfaction was alleged in the plea that was demurred to, and by the demurrer the plea was admitted.

I am of the opinion that, notwithstanding all that appears to have been done (and the parties seem to have done much to complicate the matter), the defendant still remained liable to pay the mortgage money and interest, and from this it follows that the other liabilities and rights of a mortgagor attach to him.

The proper way to dispose of the case is to refer it to the master to take all the accounts between the parties. Such reference will embrace the mortgage account, and necessarily involve an account between the defendant and the plaintiffs as mortgagees in possession, in which the plaintiffs will be charged with all rents and profits received by them, or which but for wilful neglect or default would have been received by them, in respect of the mortgaged property, regard being had to the character and condition of the property, as well as its position with respect to any covenants or contracts made by defendant with the village or the plaintiffs as to repairing, renewing, and continuing it as a "going concern" in proper repair, or otherwise howsoever, as also to any authorizations by defendant to expend moneys on the premises, if any such there were.

As down to this judgment should be awarded to the plaintiff against the defendant. Further directions and submissions will be reserved till after the report.

BOYD, C.

NOVEMBER 13TH, 1903.

TRIAL.

WILLIAMSON v. TOWNSHIP OF ELIZABETHTOWN.

Municipal Corporation — Audit at Instance of Provincial Municipal Auditor—Appointment of Auditor—Payment for Services—Demand—Practice of Department of Provincial Government—Attorney-General—Scale of Costs—Jurisdiction of County Court — Ascertainment of Amount Claimed.

Action to recover \$399.14, amount of auditor's bill, certified by the Provincial Municipal Auditor, under sec. 16 of R. S. O. ch. 228, an Act to make better provision for keeping and auditing municipal and school accounts.

G. H. Kilmer, for plaintiff.

E. E. A. DuVernet and H. A. Stewart, Brockville, for defendants.

BOYD, C.:—The plaintiff was appointed to make audit under sec. 9 of the Act, and, in the absence of any specific defence, it is to be assumed that all prior pre-requisites have been duly observed. The defence is simply denial of all alleged by plaintiff and putting him to its proof.

It was objected that the action is premature, because there is no evidence that the allowance of the bill by the Provincial Municipal Auditor was approved by the Attorney-General, and no evidence of a demand thereafter at the office of the municipal treasurer of defendants. The proof made was, that the bill as allowed by the Provincial Municipal Auditor was forwarded to the head of the municipality, with a request that it should be "attended to." by letter of 4th May. The council of the defendants were told of the amount of the bill on 11th May, and on 1st June all the papers, report, bill, and letters were read at a council meeting to all the members then assembled. This I take to be a sufficient demand to justify an action brought three months afterwards on 1st September. The demand was not at the office of the financial agent of the corporation, but was made to his principals, the municipal council—which, though other, was yet more, than the letter of the law requires. Then it appears from the certificate of the Attorney-General, which was allowed to be put in, that the practice of the Department is to act upon a tariff provided for such cases, and that the allowance of the Provincial Municipal Auditor according to such tariff is accepted as of course.

by the Attorney-General, and his signature is regarded as relating to the date of that allowance. The statute does not call for the signature of the Minister, and this practice of the department does not appear to be in contravention of the statute.

An objection was raised as to the scale of costs, but this action could not have been brought in the County Court; it is for a statutory debt exceeding \$200 and one in which the amount is not liquidated or ascertained by the act of the parties or signature of the defendants.

Judgment for plaintiff for \$399.14 and costs.

NOVEMBER 13TH, 1903.

DIVISIONAL COURT.

MOONEY v. GRANT.

Master and Servant—Claim against Executors of Deceased Person for Services—Members of Same Family Living Apart—Presumption—Expectation of Benefit from Will.

Appeal by plaintiff from judgment of MEREDITH, C.J., dismissing action (tried without a jury at L'Original) to recover for services rendered by plaintiff to her sister Frances Mooney, the defendants being the executors of her will. Plaintiff was a married woman living with her husband at East Hawkesbury; the defendant was a widow without children living by herself at Vankleek Hill, five miles from plaintiff's residence. On 2nd November, 1901, the deceased, having been taken ill, sent for plaintiff to go to her to nurse her. The plaintiff went and found her in bed, and remained with her, at her request, nursing her at the house of the deceased until the 12th May following, with some short intermissions. On 12th May, 1902, the plaintiff being unable to remain away from her own home any longer, the deceased was moved to plaintiff's house, where she remained until she died on 31st July, 1902. During all this time plaintiff nursed and cared for her. The deceased was at the time of her death the owner of a small house and lot worth about \$1,800, of some household furniture of small value, and of about \$1,250 in cash and mortgages. She had told plaintiff some months before her illness that she had made a will, and the plaintiff swore that she understood that she was to have the house and lot for her life, but that the money was to be hers absolutely; that, believing this to be the case, she had not intended to make any charges for her services to the deceased; and after the death of deceased was surprised to learn that under the

will of the deceased she took only the income of the money for life, in addition to the house and lot for life.

R. C. Clute, K.C., and J. A. McInnes, Vankleek Hill, for plaintiff.

A. H. Marsh, K.C., and F. W. Thistlethwaite, Vankleek Hill, for defendants.

THE COURT (STREET, J., BRITTON, J.) held that the presumption that services rendered by one sister to another, when they are not living together as members of the same family, are to be paid for, is much more easily rebutted than it would be if the services had been rendered to a stranger. The plaintiff, until she heard the contents of the will, had no intention of making a charge for her services. There was no reason to suppose that the deceased ever thought that plaintiff expected to be paid. In the absence of any offer of or request for payment during the nine months that plaintiff attended upon her sister, the Court should assume an understanding on the part of both that the provision in the will of the deceased in favour of plaintiff was to be her remuneration for her trouble, and that no charge would be made. There was no contract while the services were being rendered, and plaintiff had no right to claim pay for them upon finding that the income of the money only and not the principal had been bequeathed to her: *Osborn v. Guy's Hospital*, 2 Str. 728; *Baxter v. Gray*, 3 M. & G. 771; *Roberts v. Smith*, 4 H. & N. 315; *Robinson v. Shistel*, 23 C. P. 114; *Morris v. Hoyle*, 28 C. P. 598; *Mackey v. Brewster*, 10 Hun. 16; *Wood on Master and Servant*, sec. 76; *Maddison v. Alderson*, 8 App. Cas. 467; *Smith on Master and Servant*, 4th ed., p. 202.

Appeal dismissed with costs.

NOVEMBER 13TH, 1903.

DIVISIONAL COURT.

HILL v. ROGERS.

Execution—Summary Inquiries in Aid of—Ascertainment of Interest of Execution Debtor Under Will—Mortgage—Rules 938, 1016, 1019.

Appeal by plaintiff (judgment creditor) from order of STREET, J., dismissing an application by plaintiff for an order under Rules 1016, 1017, and 1018, and under Rules 938 and 1019, or any of them, declaring the rights and interest of the defendant John Rogers the younger (the judgment debtor) under the will of his grandfather, John Rogers.

J. Nason, for plaintiff.

C. H. Porter, for defendants.

THE COURT (BOYD, C., FERGUSON, J.,) held that, so far as the application was based on Rule 938 asking for construction of the will of the grandfather, it was defective because of the absence of the representatives of that estate, which was necessitated by the directions of Rule 939 (2), and it was also defective because of the absence of the eldest son of defendant Rogers. Besides, "assignment" in this Rule should not be read as extending to the case of an execution creditor of one of the beneficiaries under the will. The summary relief contemplated in the case of an execution creditor by "proceedings without writ," the general title of ch. xv. of the Con. Rules, is that embraced under sub-title 9, entitled "Summary inquiries in aid of execution," beginning with Rule 1015. The motion was also launched under Rules 1016-1019 of this sub-title. But it is inexpedient to attempt so to use these Rules in this particular case, both because of the absence of the representatives of the estate and because an action was already pending upon the Pearce mortgage, in which the applicant was served with notice T., before he made this motion. He submitted to the jurisdiction of the Court in that action and proved his claim as subsequent incumbrancer. If not redeemed, the interest of the defendants the mortgagees in the property seized in execution will be determined by the Master before it is sold, and the relief now sought on this application will then be the proper subject of adjudication, with all parties interested before the Master.

Appeal dismissed with costs to defendants; such costs to be deducted from plaintiff's judgment.

MACLAREN, J.A.

NOVEMBER 14TH. 1903.

CHAMBERS.

RE CLARKE.

Trusts and Trustees—Investments—Realization—Tenants for Life—Remaindermen—Election — Apportionment of Proceeds of Sale—Rate of Interest.

Motion by the Toronto General Trusts Corporation, who were trustees under the will of the late Mrs. H. M. Clarke, and under a settlement by one of the defendants. for an order and direction as to whether any portion, and if so what portion, of the purchase price of the premises Nos. 40, 42, 44, King street

east, in the city of Toronto, is payable to the respondents as life tenants under her will. Mrs. Clarke died on 6th November, 1878, leaving a will whereby she bequeathed all her real and personal estate to three executors in trust to sell and convert the same into money, which was to be invested by them. After providing for the payment of debts, the education and maintenance of three daughters and one son during their minority, and the payment of a legacy of \$5,000, she directed the residue to be divided equally among her four children. The share of each daughter was to be held in trust by the same trustees, or by others to be named by the daughter, she to receive the income for life, and her children the capital after her death; the son to receive his one-fourth share absolutely on coming of age. On the 1st July, 1887, after all the children had attained their majority, a deed of partition was made. The investments, which consisted of mortgages and bonds and shares, and certain cash in the hands of the trustees, were divided into four equal parts. The trustees also held the real estate now in question, in addition to certain premises in King street west, both of which had belonged to the testatrix. In the deed an undivided fourth of this property was allotted to each of the children, each share being valued at \$4,000. The former property was subject to a lease for 42 years, renewable, to expire on 1st May, 1893, the rental being £154 per annum. The children ratified the acts of the trustees and continued them in the trust. At the same time the son executed a deed to the same trustees, they to hold his share in trust for him during his life, remainder to his children. On 30th November, 1889, the applicants, with the consent of all parties, were appointed in all these trusts in the room of the original trustees. The lease of the property in King street east on its expiry was renewed for a term of 21 years at a rental of \$1,850 per annum. The lessee paid the rent for a year, but defaulted in May, 1894, and made an assignment for the benefit of creditors. The applicants took possession of the lands and buildings, but for a number of years were unable to obtain an adequate rental or make a sale. The lessee and his assignee made over to the applicants all their rights in the lands and buildings. In November, 1902, a sale was effected for \$47,500.

A. Fasken, for the applicants.

W. R. Riddell, K.C., for the life tenants, contended that they were entitled to a portion of the purchase price, because such a large price was obtained only by a long delay in selling, during which time they obtained a precarious and inadequate income, and that the \$47,500 was made up in considerable

part of accumulated income, and of the amount by which the buildings obtained by the default in payment of their rent went to make up the purchase price, which was shewn to be \$6,000: *Wilkinson v. Duncan*, 23 Beav. 469; *Beavan v. Beavan*, 24 Ch. D. 649 n.; *Re Chesterfield's Trusts*, ib.; *Walker v. Appach*, 55 L. J. Ch. 422; *Matthewson v. Goodwin*, 62 L. T. 216; that it should be ascertained what sum, at the date of the death, or one year after that date, invested at 6 per cent. up to 7th July, 1900, and at 5 per cent. since that time, with half-yearly rests, and giving credit for the income actually received by the life tenants, would have produced the purchase price of \$47,500 in November, 1902; that such sum would be capital, and the difference between that amount and the \$47,500 should be paid them as deferred income.

F. W. Harcourt, for the infant remaindermen.

MACLAREN, J.A.—The argument of the life tenants does not present a correct application of the rule. The deed of partition of 1st July, 1887, and the acceptance by each of the life tenants of an undivided fourth of the real estate as capital, the ratification of the acts of the trustees, and the appointment by them of these trustees to the new separate trusts, preclude them from going back beyond that date. It was in effect an election on their part to treat this as a satisfactory investment, and they cannot say that the property was unproductive. However, the default of the lessee in 1894, the fact of the property remaining largely unproductive until 1902, the impossibility of making an advantageous sale before that time, and the fact that the price then obtained was in a considerable part at the expense of the life tenants, raise different consideration; and the principles laid down in *Re Cameron*, 2 O. L. R. 756, should be applied. (*Boustead v. Cooper*, [1901] 2 Ch. 779, referred to.)

As to the rate of interest, the Interest Act, R. S. C. ch. 127, does not apply. The rate is to be determined by the rate which can be obtained on securities upon which trustees may invest, and $4\frac{1}{2}$ per cent. net would be a fair rate here. *Walters v. Solicitor for the Treasury*, [1900] 2 Ch. 107, 118, referred to.

Order directing a reference to Neil McLean, Official Referee, to determine what sum invested on 1st May, 1894, would have produced \$47,500 on 15th November, 1902, interest being calculated at $4\frac{1}{2}$ per cent. per annum, with half-yearly rests, and credit being given for the sums actually received by the life tenants from the rents accruing during that period. Costs and further directions reserved.

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OCTOBER 31ST, 1903.

DIVISIONAL COURT.

STANDARD LIFE ASSURANCE CO. v. VILLAGE OF
TWEED.

Correction.

In the report of this case, ante 922, it is stated that defendants appealed from the order of FERGUSON, J., ante 747, allowing an appeal from the order of the Master in Chambers, ante 731, and that the appeal was dismissed.

The statement is incorrect. The parties stated a case for the opinion of a Divisional Court, and it was upon the case so stated that the judgment reported ante 922 was given.

The question whether it was a proper case for a summary judgment was, therefore, not before the Divisional Court, who dealt with the merits of the case upon the facts as agreed upon by the parties.

BRITTON, J.

NOVEMBER 14TH, 1903.

WEEKLY COURT.

RE PAKENHAM PORK PACKING CO.

*Company—Winding-up—Action—Refusal of Leave to Proceed
—Refusal of Leave to Appeal.*

Motion by William Gorrell for leave to appeal from order of BRITTON, J. (ante 951), affirming order of McAndrew, Official Referee, dismissing application for leave to proceed

with action and counterclaim notwithstanding winding-up order.

George Bell, for applicant.

S. B. Woods, for liquidator.

BRITTON, J., held that no harm could happen to applicant by proceeding in accordance with order already made, while greater delay and more expense would necessarily result from an appeal. The action should not be allowed to proceed unless that is the only way open to applicant to get in his defence as set out in the statement of defence and counterclaim. Leave to appeal refused. No costs.

CARTWRIGHT, MASTER.

NOVEMBER 16TH, 1903.

CHAMBERS.

STONE v. OTTAWA ELECTRIC CO.

*Particulars — Statement of Claim — Action for Negligence—
Defects in Electrical Appliances — Postponement till after
Examinations for Discovery.*

In August, 1903, the plaintiff's husband was instantly killed (as alleged in the statement of claim) by taking hold of an electric lamp, part of the service of the defendants.

It was further charged that the wires, conductors, and appliances were out of repair and without proper and sufficient insulation, and that the transformers and their appliances were also defective and out of repair and without proper insulation; by reason whereof an electric current of 2,000 volts was conducted to the aforesaid lamp.

The defendants demanded particulars of these alleged defects. None being given, a motion was made.

J. E. Jones, for defendants.

H. M. Mowat, K.C., for plaintiff, relied on the cases cited in *Holmsted & Langton*, at p. 483, under heading of "Particulars not Ordered."

THE MASTER.—"An examination of the authorities satisfies me that the defendants can safely plead to the statement of claim. They have only to traverse generally the allegation of the plaintiff and put her to proof thereof.

If at a later stage they are really in doubt as to what is going to be set up at the trial, and if, after the examinations for discovery, the matter is still left in doubt, they can renew

their motion. In the meantime it must be dismissed with costs to the plaintiff in the cause.

I would refer to my observations in *Becker v. Dedrick*, 2 O. W. R. 786, and *Fuller v. Appleton*, ib. 829, on the question of when particulars should be given, that each case must largely depend on its own facts. Here the matters can only be understood and explained by experts in electricity. The defendants themselves are more likely to know what, if any, defects existed than anyone else, though I admit that is not decisive.

MEREDITH, J.

NOVEMBER 16TH, 1903.

TRIAL.

CRAIG v. BEARDMORE.

Sale of Goods—Property Passing—Loss of Goods—Default of Vendee—Action for Payment—Unconditional Contract for Sale of Specific Goods in Deliverable State—Postponement of Delivery and Payment—Construction of Contract—Intention of Parties.

Action for the price of goods sold, tried at Lindsay.

R. J. McLaughlin, K.C., for plaintiffs.

H. J. Scott, K.C., for defendants.

MEREDITH, J.—The plaintiffs confine their claim to one for money payable by defendants to them for goods bargained and sold by them to defendants. They do not claim in the alternative damages for breach of contract to buy; and the one question presented by them for consideration is whether the property in the goods passed to defendants at the time of the contract for the sale of them.

The contract is in writing. A general form, prepared and generally used by defendants, was used in this instance, and altered by the parties with the intention of fitting it to the facts of the actual transaction.

Had the transaction been really such an one as was contemplated by the framers of the form, the plaintiffs could hardly hope to succeed on the ground upon which their claim is based; but it was not; it was a very different transaction. as the added words plainly, but not so plainly as the whole facts and circumstances, shew.

Before the writing was signed the defendants, through their purchasing agent, had measured and classified the goods. The parties were dealing in regard to the certain specific tan

bark so measured and classified; the contract could have been satisfied by the delivery of that bark only; other bark, even if of the like quality, would not have done, because not so measured and classified.

Unless a different intention appears from the terms of the contract, the conduct of the parties, and the circumstances of the case, it is a general rule that when there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.

That rule is quite applicable to this case, so far as the 550 cords of bark in question is concerned.

The words "agree to sell," which were a part of the prepared form, and the added words "or more," do not take the case out of the rule, or shew a different intention. According to the testimony, the words "or more" were inserted so as to cover an additional small quantity of bark of the plaintiffs, which had not been measured and classified, and the contract in reality was one evidencing an actual sale of the 550 cords, and an agreement to sell the additional quantity. If the words "or more" had any legal effect at all. Had the words "agree to sell" been added by the parties instead of being part of the form, the same result would be reached; they are quite applicable to the "or more" quantity; and the parties were not persons from whom literary exactness could be expected.

There is indeed but one circumstance pointing against the passing of the property, and that is the fact that plaintiffs had yet to haul the bark from the place where it was measured and classified to the railway and to load it upon the railway company's cars. The whole contract was fully completed, as to the 550 cords, on both sides, except as to the delivery of the goods, in that manner, and the payment of the balance of their price. . . .

Cases may be imaginable in which the fact that the seller is yet to deliver the goods would indicate an intention that the property was not to pass until delivery; but here the general rule applies, and there is really nothing to indicate a different intention.

It is satisfactory to know that this conclusion is in accord with the testimony of the persons who made the contract, as well as with the entries made by defendants in their books giving plaintiffs credit, at the time of the making of the contract, for the full price of the 550 cords of bark.

That the loss of the goods was occasioned through defendants' default is quite clear, but whether that alone would make them liable, according to the law of the Province, upon the principle adverted to by Blackburn, J., in *Martineus v. Kitchen*, L. R. 7 Q. B. 436, at p. 456, a principle which seems to have been embodied in the Imperial Act, 56 & 57 Vict. ch. 71, codifying the law relating to the sale of goods (see sec. 20), need not be now considered.

There will be judgment for plaintiffs with costs; the damages will be the balance of the price of the tan bark hauled to the railway, less what would have been the additional cost to the plaintiffs if they had been able to and had put it on board the cars, as the contract required.

NOVEMBER 16TH, 1903.

DIVISIONAL COURT.

AMERICAN COTTON YARN EXCHANGE v. HOFFMAN.

Sale of Goods—Part of Goods not as Ordered—Retention of Goods—Waiver—Conversion.

Appeal by defendants from judgment of MACMAHON, J. (ante 416), in favour of plaintiffs in action to recover \$365.56, the invoice price of four parcels of cotton yarn supplied by plaintiffs at Boston, Mass., to defendants at Stratford, Ont. Defendants received the yarn on 16th September, 1901, and at once wrote objecting to the colour of parcels 2 and 4, invoiced at \$169.89, and were told by plaintiffs to return it to be redyed. As this would involve further payments of duties, defendants suggested that they could have it redyed in Canada. Some further correspondence took place, and finally plaintiffs on 28th November, 1901, wrote to defendants suggesting that defendants should "take the matter up at their end and straighten it out." Defendants made no reply to this letter; they used all the yarn in parcels 1 and 3, invoiced at \$195.67; they were told on 28th December, 1901, by the Forbes Co. at Hespeler, Ontario, to whom they had written about redyeing the yarn, that the Hamilton Cotton Co. would be able to redye it; but defendants endeavoured to have it done by some local men of no experience, with unsatisfactory results, using part of it from time to time. During this time plaintiffs frequently wrote asking defendants what they were doing, and why they sent no money, but no replies were made by defendants to any letters.

Finally, on 22nd May, 1902, plaintiffs succeeded, through an agent, in obtaining an oral explanation from defendants. Then they wrote defendants again asking them to send back the yarn or what was left of it, and that they would pay freight and duty on it, but no notice was taken of this request, and this action was begun on 12th August, 1903.

The trial Judge gave judgment for plaintiffs for the amount of their claim, less \$25 allowed for the estimated cost of redyeing. He also dismissed a counterclaim for loss of profits.

G. G. McPherson, K.C., for defendants, appellants.

E. Sidney Smith, K.C., for plaintiffs.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.—It is clear that the yarn in parcel 2, invoiced at \$52.44, and parcel 4, invoiced at \$117.45, was not of the colour ordered, and that plaintiffs consented to defendants' course of accepting the other two parcels, invoiced at \$195.67, and rejecting parcels 2 and 4. The defendants purposed having it redyed in Canada, and to this the plaintiffs . . . practically assented . . . Defendants seem to have gone through a series of experiments for months, all the while refusing to pay for the yarn they had used or to give any answer or explanation to plaintiffs or to return the unused yarn on any terms. I think their conduct amounts to a waiver of the right which they originally had to refuse to accept or pay for the yarn; or, if the yarn is to be treated as the property of plaintiffs, then to a conversion of it, and that plaintiffs are entitled to recover. I can find no evidence upon which the counterclaim can be supported. Appeal dismissed with costs.

NOVEMBER 16TH, 1903.

DIVISIONAL COURT.

RAY v. OLIVER.

Chose in Action — Equitable Assignment — Oral Promise to Repay Overdraft at Bank from Specified Source.

An appeal by plaintiffs from the judgment of the Judge of the District Court of Thunder Bay in favour of defendant in an interpleader issue, tried before him without a jury.

Plaintiffs were private bankers, and defendant was the assignee for the benefit of creditors of Carpenter & Co., contractors. That firm were engaged in unloading steel rails for Mackenzie & Mann, railway contractors, for which they were paid monthly, and they kept an account with plaintiffs. They occasionally overdraw their account, and had more than once made written assignments to plaintiffs of their accruing monthly claim against Mackenzie & Mann to secure advances.

On 17th November, 1902, a clerk of Carpenter & Co., duly authorized, went to plaintiffs' bank and asked the manager to allow Carpenter & Co. to overdraw. The manager said that the clerk asked for an overdraft against the moneys due from Mackenzie & Mann on steel account, and promised that he would give a draft for it at the end of the month. One of the clerks in the bank said that he heard the conversation, and that the clerk of Carpenter & Co. asked to withdraw the account; that he "would pay for this out of the moneys coming from Mackenzie & Mann—would take it up at the end of the month—cover it;" but that he could not remember the exact conversation. The clerk of Carpenter & Co. swore that he merely asked to be allowed to overdraw the account, saying nothing as to how it was to be repaid. The overdraft was allowed. On 29th November, 1902, Carpenter & Co. assigned to defendant.

At the end of the month Mackenzie & Mann owed Carpenter & Co. \$365 for unloading steel rails, and Carpenter & Co.'s account with plaintiffs was overdrawn \$393.55. Both parties claimed the \$365, which was paid into Court, and an issue directed.

The Judge of the District Court decided that no equitable assignment to plaintiffs had been proved, and ordered that the money should be paid out to defendant.

Plaintiffs appealed.

The appeal was heard by STREET and BRITTON, JJ.

J. H. Moss, for appellants.

H. L. Drayton, for defendant.

STREET, J.—In my opinion, the conclusion arrived at was clearly right. Even if we assume that the clerk when asking to be allowed to overdraw the account promised to repay the amount out of the moneys coming at the end of the month from Mackenzie & Mann, this would not be more than an indication of the source from which he expected to obtain the funds with which to repay the advances, and would fall far

short of an assignment of those moneys. . . . Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion, referring to *Hall v. Prittie*, 17 A. R. 310.

NOVEMBER 16TH, 1903.

C.A.

STEWART v. WALKER.

Will—Action to Establish—Evidence of Communications by Deceased to Solicitor—Privilege—Admissibility—Lost or Destroyed Will—Proof of Execution—Proof of Contents—Presumption of Destruction Animo Revocandi—Rebuttal—Declarations of Deceased—Evidence of Principal Beneficiary—Corroboration—Evidence of Admissions by Defendant opposing Will—Cross-examination.

Appeal by the defendant the Attorney-General for Ontario from judgment of MACMAHON, J., 1 O. W. R. 489, in favour of plaintiff in an action brought to establish the will of John Alexander McLaren, made on 28th June, 1897. The deceased was illegitimate and unmarried. The plaintiff was the son of his half-sister (by blood, though not in law). After the death in 1902 no will was found, and an escheat was claimed by the Crown.

MACMAHON, J., held that the making of the will was established, and ordered that a copy of it produced by plaintiff should be admitted to probate.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, and GARROW, JJ.A.

G. F. Shepley, K.C., and A. B. Aylesworth, K.C., for the appellant.

G. H. Watson, K.C., and Grayson Smith, for plaintiff.

W. R. Riddell, K.C., for defendant Minnie Hamilton.

J. Lorn McDougall, Ottawa, for defendant Eliza McIntyre.

S. H. Blake, K.C., for the other defendants.

MOSS, C.J.O.—One objection taken on behalf of the appellant was to the rejection of the evidence of Mr. Francis A. Hall, solicitor, with regard to certain communications said to have passed between him and the deceased during the existence between them of the relationship of solicitor and

client, and which those opposed in interest to the Attorney-General claimed the right to exclude, on the ground that they were privileged. We held that the evidence should have been received, and, acting under Rule 498, directed it to be given orally before the Court. The privilege is not the privilege of the solicitor, but of the client, who may waive it or not as he pleases. The client by whom the communications were made was dead, leaving no heirs or next of kin to stand in his place. No person survived him upon whom the benefit of the privilege devolved, unless it was the Attorney-General, who, in the event of intestacy, would be entitled to obtain letters of administration to the estate: R. S. O. ch. 70. The plaintiff claims the benefit of the privilege as executor of the will, but the existence or non-existence of the will is the question at issue. The mere fact of the death did not destroy the privilege, but the right of the Attorney-General to waive the benefit was at least equal to that of plaintiff. The nature of the case precluded the question of privilege from arising. The reason on which the rule is founded is the safeguarding of the interests of the client, or those claiming under him, when they are in conflict with the claims of third persons not claiming, or assuming to claim, under him. And that is not this case, where the question is as to what testamentary dispositions, if any, were made by the client. (Russell v. Jackson, 9 Hare at p. 392, referred to.) . . . It has been the constant practice to apply the rule here stated in cases of contested wills, where the evidence of the solicitors by whom the wills were prepared, as to the instructions they received, is always admitted. And the application of a different rule in this action would deprive plaintiff of a considerable part of the proof of his case.

Mr. Hall appeared and testified before the Court on the 2nd October, and the case is now to be dealt with upon all the evidence before the Court.

The testimony establishes, and it is not now disputed, that on 25th June, 1897, the deceased executed, with all the formalities prescribed by the statute, a paper prepared by plaintiff, by the direction of the deceased, purporting to be his last will and testament. We commence, therefore, with that fact well proven. The paper not being produced, the questions are: (1) Have its contents been proved and established with sufficient certainty? (2) Was it revoked or destroyed by the testator *animo revocandi* or *animo cancellandi*, or is it to be deemed as still in existence as a valid subsisting will, lost, mislaid, or destroyed, by accident or otherwise.

without intention on the part of the testator to put an end to it as a testamentary paper? . . .

Beyond question the will was drawn by plaintiff from instructions given to him by the deceased. Plaintiff so deposes, and the circumstances support his statement. The plaintiff was at that time the deceased's general solicitor and legal adviser, and it was not unnatural that if he was minded to make a will he would instruct plaintiff to prepare it for him. It was shewn that he was at the plaintiff's office on the morning of the day on which the will was executed, and that he returned in the afternoon and then executed the will in the presence of plaintiff and the two attesting witnesses, Peter McGregor, who was a witness at the trial, and Archibald Elliott, who had died some time before the trial. . . . At the forenoon interview there was some discussion about the custody of the will after it was executed, and the deceased said he would keep it himself. He then went away, and plaintiff immediately prepared the will. . . . He also made a copy, intending to keep it. In the afternoon deceased returned. The plaintiff handed him the will he had drawn, and he read it over carefully, and in reply to a question by plaintiff whether it was all right, said yes. The witnesses were then brought into plaintiff's room, and deceased executed the will. After the witnesses left plaintiff's room, he placed the will in an envelope and handed it to deceased, who took it away with him. This was the last plaintiff saw of it. . . . No person but plaintiff ever saw the copy during the deceased's lifetime. . . .

The trial Judge appears to have accepted plaintiff as a truthful witness, and certainly there is nothing in his evidence as reported that ought to lead to a contrary conclusion. In an ordinary case of a contest between two living persons with regard to the contents of a lost deed to which they were parties, the testimony of one who produced and swore to the truth of a copy would, if credited, be sufficient to prove the contents without corroboration. If in a case like the present there is a different rule, it is only by reason of the circumstance that it is the contents of a will that are sought to be established, and that the maker of it is deceased. Undoubtedly, the Court should be more careful in accepting and acting upon the evidence, but if it is completely satisfied with the general truthfulness and veracity of the witness, that his testimony is consistent with the circumstances, and that in general his memory is accurate, the extent of corroboration required may safely be measured by these considerations. . . .

[Sugden v. Lord St. Leonards, 1 P. D. 154, referred to.]

In the case at bar, if plaintiff's evidence is to be credited, there is no difficulty as to the exact terms of the will. But plaintiff's evidence is not without corroboration in the circumstances preceding and surrounding the making of the will and in the deceased's acts and declarations as deposed to by other witnesses. . . . The terms of the will, as set out in the paper produced, appear reasonable and in accord with the probabilities. There is further support from acts and expressions of the deceased subsequent to the making of the will. It has been urged that these should not be received as evidence on this branch of the case. It is argued that, although they may be regarded as throwing light on the question of intention to adhere to the will, and as therefore rebutting the presumption arising from non-production, they should not be looked at as evidence in proof of the contents. But while the decision in *Sugden v. Lord St. Leonards* (*supra*) stands, it must be accepted as the law that declarations subsequent to the making of a will are admissible as secondary evidence of its contents. . . .

[*Woodward v. Goulstone*, 11 App. Cas. 469, and *Atkinson v. Morris*, [1896] P. 40, referred to.]

Upon the whole the evidence is ample to sustain the finding that the paper produced by plaintiff is a copy of the will executed by the testator on the 25th June, 1897.

The plaintiff's action in making a copy of the will and preserving it without communicating the fact to the deceased, although aware of the latter's aversion to any one becoming acquainted with its contents, was commented upon, and properly so, by counsel for the appellant. . . . His action in this respect has naturally provoked some suspicion, and led to comments upon the weight to be attached to his testimony in other respects. But this error of judgment ought not to outweigh the circumstances and the general effect of his testimony. . . .

There are many circumstances in evidence which go to rebut the presumption of intention to cancel or revoke the will. The appellant complains that plaintiff and these in the same interest were permitted to lead evidence on this branch in a manner calculated to prejudice the appellant, and by means of which he was prejudiced. The objections are chiefly with regard to the reception of evidence of statements alleged to have been made by the defendant Mrs. McIntyre tending to attribute the disappearance of the will to her act, and to the ruling that after Mrs. McIntyre was examined in chief by her own counsel, she could be cross-

examined by counsel for the appellant and afterwards by counsel for plaintiff and others in the like interest. The Judge ruled in the first instance that statements alleged to have been made to or in the hearing of witnesses were admissible as evidence, not only against herself, but against all parties, including the appellant, and also that her depositions taken before trial for purposes of discovery were admissible to the same extent. . . . The evidence was admitted and given in accordance with the ruling. Afterwards on reconsideration the Judge corrected his rulings and held that the evidence was only admissible against defendant Mrs. McIntyre. It is objected that Mrs. McIntyre was in the same interest as plaintiff and her co-defendants, and that the evidence ought not to have been admitted at all. But Mrs. McIntyre had not taken the same position as her co-defendants. She had traversed the allegations of the statement of claim, and plaintiff was entitled to prove them as against her by any evidence which would be binding on her, and to that extent the evidence was clearly admissible, but it could not and should not be permitted to prejudice the appellant's case.

With regard to the order of conducting the cross-examination of Mrs. McIntyre, it would have been more satisfactory if the Judge had directed that her cross-examination by plaintiff and those in the same interest should follow her examination in chief, leaving the final cross-examination in the hands of the counsel for the appellant. But this was a matter entirely in the discretion of the trial Judge. Even if it had directed plaintiff and others to first cross-examine, it would not have been improper for them to have treated her as a witness called by an opposite party, and to put leading questions to her (*Parkin v. Moor*, 7 C. & P. 409), though if she had appeared very willing to aid plaintiff's case, the Judge might have stopped it, and manifestly it would greatly lessen the value of the testimony. But it cannot be said that Mrs. McIntyre was friendly to plaintiff, or disposed to assist him, and in some respects her evidence tended less to his advantage than to the advantage of appellant.

Making every allowance for any disadvantage the appellant may have been placed in by the rulings, and discarding from consideration all parts of Mrs. McIntyre's testimony and of her alleged statements to others that were not receivable against the appellant, there yet remains ample evidence to support the finding of the testator's adherence to the will up to the time of his death. . . . He was well aware of the consequences of intestacy in his case, and with his well-known desire to prevent the property falling into the hands

of the government, it is not to be supposed that he had done the very act which would bring about that result. The will was taken by him into his own custody. In his home there was a valise which he spoke of as containing valuable papers. The key of this he kept in the pocket of his trousers, and it was found there after his death. On the day of his death the valise was removed, with some boxes and articles of furniture, from the hall or room in the front of the house to a room upstairs. When removed the valise was heavy as if full of papers or other articles. The next morning it was seen with the lock forced open and empty. The contents have not been since discovered or seen. There is no reason to suppose that it had been opened or handled by the deceased from the day he was attacked by his last illness to the time of his death. It is not necessary to ascertain whose was the act of breaking open the valise and abstracting its contents. It is quite evident that it was not done by the directions or with the knowledge of the testator. . . . The conclusion on the evidence must be that up to the time of his death he adhered to the will of 25th June, 1897.

Appeal dismissed. No costs of the appeal.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

OSLER and GARROW, J.J.A., concurred.

NOVEMBER 16TH, 1903.

HINDS v. TOWN OF BARRIE.

Parties—Joinder of—Separate Causes of Action—Damage by Overflow of Watercourse — Rules 185, 186, 187 — “Combined” Acts of Defendants—Election or Amendment.

Appeal by defendants from an order of a Divisional Court dismissing appeal from order of MEREDITH, C.J., in Chambers, refusing application by defendants for order requiring plaintiff to elect whether she would in this action proceed against defendant Reuben Webb, abandoning her claim against the town corporation, or vice versa, on the ground that the statement of claim disclosed that defendants were sued in the same action as separate tort-feasors in respect of separate and distinct torts, and the joinder of the two claims was improper and tended to prejudice and embarrass defendants.

W. M. Douglas, K.C., for appellants.

A. E. H. Creswicke, Barrie, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.) was delivered by

OSLER, J.A.—The question is, whether, under Con. Rules 186, 187, plaintiff is entitled to retain both defendants in the action, or whether she must not elect against which of the two she will continue it.

Plaintiff sues for the obstruction of a watercourse which passes through her property, thereby causing it to be overflowed and damaged.

The statement of claim alleges: (4) that the plaintiff's premises and those of defendant Webb are nearly opposite each other, separated only by a street or highway of the corporation defendant; (5) that a natural watercourse has long existed which runs easterly and then northerly through the town, passing through plaintiff's premises, and then, after crossing the street, through defendant Webb's premises, and thence to Kempenfeldt Bay; (6) that defendant corporation constructed a culvert over the watercourse crossing the street; (7) that before the grievances complained of the town diverted into the said watercourse large quantities of water which would not but for such act have passed into it and through plaintiff's premises; that the culvert was not large enough to permit the waters running down the watercourse to be carried down to the bay; (8) that defendant Webb contracted the watercourse where the same ran through his premises, by boxing it in with timber and covering it with earth: (9) that defendant corporation likewise diminished and further contracted the watercourse through the culvert constructed by them, by putting in sewer pipes, water pipes, and other pipes, across the culvert, thereby diminishing the capacity for the flow of water through the same; (10) that the effect of putting in the pipes across the culvert, in addition to diminishing its capacity, was to obstruct and collect driftwood, etc., and other floating material as it passed down the watercourse, and to cause it to become lodged against the pipes and thus obstruct the flow of water through them, and the watercourse thereby became obstructed at and for a long time before the time hereafter referred to; (11) that the effect of the combined acts of defendants was, during freshets, to cause the waters flowing down in the watercourse to become obstructed in their flow to the bay and to thereby be dammed back upon and to overflow the lands of plaintiff; (12) that defendant corporation having constructed the culvert and diverted waters to the watercourse which would not otherwise have come there, and having allowed it to become blocked

with driftwood, rubbish, etc., and the watercourse having been further contracted where it crossed the lands of defendant Webb, it became choked and stopped up, by reason whereof the waters and drainage received into it on 4th and 5th July, 1902, overflowed therefrom upon plaintiff's lands, and did the damage complained of.

Plaintiff claimed \$1,000 for damage and further and other relief. . . .

The leading case upon the construction and application of the corresponding English Rules is *Sadler v. Great Western R. W. Co.*, [1895] 2 Q. B. 688, [1896] A. C. 450.. In dealing with our own Rules we ought to follow and apply that decision. It was there held that claims for damages against two or more defendants in respect to their several liability for several torts cannot be combined in one action. . . . (*Smurthwaite v. Hannay*, [1894] A. C. 494, referred to.)

These Rules (185, 186, 187) were, in short, expounded as Rules dealing merely with parties to an action, and as having no reference to the joinder of several causes of action; a subject which is dealt with or partly dealt with by another group of Rules, 232 et seq.

Our Rule 185 as to the joinder of plaintiffs has been amended substantially in accordance with the amended English Rule, but the Rule as to joinder of defendants has not been touched. The reasoning in *Smurthwaite v. Hannay* and the decision in *Sadler v. Great Western R. W. Co.* must, therefore, still be regarded here as in England when dealing with the latter Rule. Different defendants cannot be brought before the Court in the same action where the real causes of action that exist against them are separate. . . .

No joint cause of action is disclosed. An unlawful act is alleged against each defendant. It is not charged that these acts were done in concert, or that defendants were jointly concerned in their commission. . . . It is charged that the natural effect of the combined acts of defendants is to cause the water flowing through the watercourse to become obstructed and to be dammed back upon and to overflow plaintiff's land. "Combined," in this connexion, the wrongful acts alleged being independent of each other, means no more than "concurrent" (*Sadler v. Great Western R. W. Co.*, [1895] 2 Q. B. at p. 694), and does not charge a joint cause of action (S. C., p. 693). Each of these acts being wrongful gives rise to a separate cause of action against each defendant, though their injurious result may be increased, or even sensibly caused, by the concurrence of both. I refer to *Lambton v. Mellish*, [1894] 3 Ch. 163-6; *Blair v. Deakin*, 57 L. T. N. S. 522-6; *Nixon v. Tynemouth*, 52 J. P. 504.

As to the acts complained of and the circumstances under which they may give rise to a joint or several cause of action, I refer to *Wallace v. Drew*, 59 Barb. 413; *Ames v. Dorset*, 64 Vt. 10; *Bryant v. Bigelow*, 131 Mass. 491; *Wheeler v. Wheeler*, 10 Allen 591, 600, 601.

I decide nothing more than seems to be required upon the construction of the pleading before us. I think the language of the Rules is embarrassing, if it be not presumptuous to say so, and calculated to mislead a litigant, and promote delay and expense. . . . The principal and agent cases stand upon a footing of their own, which is explained in *Thompson v. London County Council*, [1899] 1 Q. B. 840. So also the company and director cases founded on an improperly issued prospectus. Probably the phrase "cause of action" is not to be strictly read in its former technical sense, so that where persons have been parties to a common act which has caused damage to plaintiff they may be joined in the same action, though the nature and extent of the relief to which he may be entitled against them is different.

I refer also to *Gower v. Couldridge*, [1898] 1 Q. B. 348; *Frankenberg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 512; *Kent v. Coal Exploration Co.*, 16 Times L. R. 486; *Quigley v. Waterloo Mfg. Co.*, 1 O. L. R. 606; *Evans v. Jaffray*, ib. 614.

I have not overlooked *Booth v. Ratte*, 21 S. C. R. 637. The dictum relied upon, though entitled to all respect, is obiter, and at this stage of the case before us, and the present state of the authorities, I do not see how we can apply it.

The appeal must, therefore, be allowed, and plaintiff must elect against which of the two defendants she will continue the action; but she is to be at liberty to amend by setting up, if she can, a joint cause of action.

The costs throughout may be costs in the cause between the plaintiff and defendant corporation.

NOVEMBER 16TH, 1903.

C.A.

HOLSTEIN v. COCKBURN.

Plans and Surveys—Identity of Island—Description—Accreage—Mistake in Patent.

Appeal by plaintiffs from judgment of STREET, J., in favour of defendants, upon the findings of a referee, in an action for trespass to island "M." in Lake Muskoka.

The point to be determined was whether the island in dispute was "M." or "N." If it was "M.," it was the plaintiff's property. If it was "N.," it belonged to defendant.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.

E. E. A. DuVernet and D. C. Ross, for appellants.

Strachan Johnston, for defendant.

MOSS, C.J.O. (after reviewing the evidence as to the situation, etc., of the islands):—The strong argument made for plaintiffs is that in the departmental map, and in two of the conveyances to them, "M." is described as containing 3 acres, whereas the island awarded to them by the judgment contains only 95-100 of an acre. The patent does not assign 3 acres to "M." . . . But the departmental map may be looked at on the question of acreage: *Kenny v. Caldwell*, 21 A. R. 110: and, no doubt, the impression in the department was that island "M." contained 3 acres.

But that impression, and even the statement that it contained 3 acres, cannot alter the location nor make the island which the department marked "N." become "M." in order to answer the number of acres. The governing part of the description in the defendant's chain of title is that which designates the parcel as island "M." in Lake Muskoka. That is the specific name under which the whole parcel will pass, and the location and identity of the island having that name being established, the grantee acquires the whole area, whatever it may be, but he can get no greater area or more than it actually contains. . . .

[*Iler v. Nolan*, 21 U. C. R. 309, and *Attrill v. Platt*, 10 S. C. R. 425, referred to.]

There are no facts in the present case to create an exception to the general principle, which must, therefore, prevail.

The conclusions of the judgment appealed from are correct, and the appeal should be dismissed.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, J.J.A., concurred.

NOVEMBER 16TH, 1903.

C.A.

RE McDONALD AND TOWN OF LISTOWEL.

Way—Closing Street Allowance—Amendment of Plan—Registry Act—Petition to County Court Judge—Jurisdiction of Judge of another County Acting on Request—Local Courts Act—Evidence on Petition—Affidavits—Answer to Oral Testimony—Grounds for Closing Street—Motion to Open up Proceedings—Refusal—Right of Appeal.

In June, 1902, John Hamilton McDonald applied by petition to the Judge of the County Court of Perth, under sec. 110 of the Registry Act, R. S. O. ch. 136, for an order altering or amending a certain plan of part of a lot in the town of Listowel, by closing a part of the allowance for street called McDonald street in the plan.

The Judge appointed the 3rd July, 1902, and directed service of his appointment to be made on all parties concerned. The hearing was adjourned from time to time until the 28th November, 1902. On that day the matter was proceeded with before the Judge of the County Court of Oxford, sitting for and at the request of the Judge of Perth.

Counsel for Samuel L. Kidd objected that the Judge of the County Court of Oxford had no jurisdiction to try the matter, under sec. 110.

The objection was overruled, and the hearing was proceeded with. The petitioner then supported his petition by viva voce evidence of himself and witnesses called on his behalf. At the close of his case Mr. Kidd testified on his own behalf, and his counsel then tendered in evidence the affidavits of George A. Wattie, Walter A. McCarney, and John A. Askin. Counsel for the petitioner objected, and the Judge refused to receive them. No application was made for an adjournment in order to procure the attendance of the deponents, and the case was argued on the merits. Subsequently the Judge gave judgment in favour of the petitioner, and pronounced an order for the amendment of the plan as prayed.

On the 30th January, 1903, an application on behalf of Mr. Kidd was made to the Judge of Oxford to open up the proceedings and for leave to adduce further and additional evidence. The application was opposed, and after argument was dismissed, the Judge holding that after he had pronounced judgment and made an order, he had no power to act further in the matter.

The appeal was by Kidd from both orders.

W. M. Douglas, K.C., for J. H. McDonald, the respondent, objected that no appeal lay from the latter order, and he moved to quash that part of it. The appeal was allowed to proceed subject to the objection.

D. L. McCarthy, for the appellant, contended: (1) that the Judge acted without jurisdiction; (2) that he ought to have received the affidavit evidence; (3) that on the merits he should have refused to amend the plan; (4) that he should have allowed the motion to open up the proceedings.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.,) was delivered by

MOSS, C.J.O.—On the question of jurisdiction the argument was that under sec. 110 of the Registry Act the County Judge does not act for the Court or judicially, but merely as *persona designata*, and that he could not empower any other Judge to take his place. But the language of sec. 110 does not support this contention. The power given is to be exercised by the High Court or a Judge thereof, or the Judge of the county in which the lands lie. A Judge of the High Court acting under the section, would clearly be representing the Court. His acts would be the acts of the Court, and therefore what he would do would be done in his judicial capacity. And it would be a strange anomaly if the Judge of the County Court should be deemed to be acting in a different capacity. He is performing the duty of a Judge equally with a Judge of the High Court under similar circumstances.

[Waldie v. Burlington, 13 A. R..104, referred to.]

It is, therefore, one of the judicial duties to be performed by the Judge of a County Court in any case where application is made to him instead of the High Court or a Judge thereof. By sec. 16 of the Local Courts Act, R. S. O. ch. 54, the Judge in any county may, if he sees fit, perform any judicial duties in any county other than his own, on being requested to do so by the Judge to whom the duty for any reason belongs.

This language fully covers the case. By force of it the Judge of the County Court of Oxford, having seen fit to comply with the request of the Judge of Perth to perform the duty belonging to the latter, under sec. 110, was put in the latter's place for the purposes of the application. Being so placed, sec. 18 of the Local Courts Act also applies to him and the duties he may perform.

With regard to the nature of the evidence to be received on the hearing of the petition, it is important to bear in mind the nature and effect of the order sought for under sec. 110. Subject to appeal, the order to be made finally and conclusively settles the rights of the parties concerned. Though the application may be brought before the Court or Judge on petition, and is therefore interlocutory in form, the form of the application does not settle the mode in which the evidence is to be taken. . . . [Gilbert v. Endean, 9 Ch. D. at p. 269, and Attorney-General v. Metropolitan District R. W. Co., 5 Ex. D. 218, referred to.]

In applications under sec. 110 cases may arise in which the Judge might fairly consider it not improper to receive and act upon affidavit evidence, and he might certainly do so upon agreement between the parties, but, in the absence of agreement, the prevailing rule ought to be that when there are facts in dispute the witnesses should give their testimony *viva voce*. This is in harmony with the practice under the Judicature Act, and the Con. Rules, except in regard to matters distinctly interlocutory in their nature. See Rules 483, 484, 485, et seq. And as a means of eliciting the truth it is much more satisfactory. In this case the investigation was proceeded with on the testimony given *viva voce*, and it cannot be said that the Judge erred in giving effect to the objection to the reception of affidavits when tendered in answer to the petitioner's case. If he had permitted them to be read, the deponents would have been subject to cross-examination, and neither time nor expense would have been saved. There is, therefore, no ground for interfering with his ruling.

Upon the merits the petitioner established sufficient grounds to justify the order made. The portion of the street in question, though delineated on the plan filed in 1878, was never opened or used as a street or highway. The lands abutting on both sides are owned by the petitioner. There was no opposition by the owners of lots abutting the portion to the west, and Gladstone street—a travelled highway—intervenes between the portion in front of their lots and the portion proposed to be closed; so that they are not cut off from access to the nearest highway. . . .

As to the motion to open the proceedings and receive further evidence, the learned Judge rightly dealt with it. In any case there could be no appeal from his decision on the motion. The appeal to this Court under sec. 110 is from the order made upon the hearing of the application to amend the plan. This does not include every order made in the

course of the proceedings—and more especially should it not apply to an order made after the application was disposed of.

The appeal must be dismissed.

NOVEMBER 16TH, 1903.

C.A.

JOHNSTON v. LONDON STREET R. W. CO.

Street Railway—Laying Double Track on Street—Injury to Abutting Land—Rights of Owner—Injunction—Permission of Municipality — Resolution — By-law — Altering Grade of Street—Remedy — Compensation — Obstruction — Nuisance—Special Injury.

Appeal by plaintiff from judgment of BRITTON, J., dismissing action with costs.

Plaintiff was the owner of certain town lots in the city of London fronting on the south side of Railroad street. Since the year 1895 defendants had, under an agreement with the corporation of the city of London, maintained a single line of track on Railroad street as part of their trolley system over which they operated their cars.

Plaintiff, by this action commenced on the 6th May, 1902, asked for an injunction restraining defendants from laying or putting down a second track or double line of railway on the street, which the defendants were doing under the authority of a resolution of the city council of London passed on the 17th March, 1902 (since supplemented by a by-law passed on the 19th May, 1902,) permitting defendants to construct and maintain another track on certain terms and conditions.

N. W. Rowell, K.C., and U. A. Buchner, London, for appellant.

I. F. Hellmuth, K.C., and J. O. Dromgole, London, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.:—The plaintiff was aware of the resolution and saw defendants commencing to do the work on or about the 26th March, 1902.

The work involved the lowering of that part of the street on which the defendants' single track was laid in front of

plaintiff's premises, east of the street called Johnston street, thereby levelling the roadway in front of that part of the plaintiff's premises. It was also rendered necessary that the roadway in front of that part of his premises to the west of Johnston street should be filled up or heightened so as to make a level grade. Plaintiff saw the work being done, but took no steps to prevent it, nor did he complain of it. And it was not until defendants began to lay their double track that he commenced proceedings.

In his evidence at the trial he admitted that the grading done in front of his premises east of Johnston street was a benefit to him, and it is clear that he is correct in this. When the work as directed to be done by the city engineer is done, there will be a wider and more level highway than formerly, and, although it will be lower at the curb than before, he will be provided with a sloped entrance from the street. And it is quite evident that he was content to allow the whole of the grading to be done from one end to the other of Railroad street, including the filling or heightening of the roadway at the west end of which he made complaint at the trial and on the argument of the appeal. . . . His great cause of complaint is that upon the improved highway the defendants are proceeding to lay a second track. And it is to be noted that in the statement of claim the only complaint made is in regard to the double track. The alleged interference with his access to his property was not thought of until afterwards.

The work which is being done by defendants is being performed under the authority and with the permission of the municipality. Levelling, grading, gravelling, and curbing a street is work which the city may undertake without a preliminary by-law. In the circumstances of this case, it must be considered that the work was done by the defendants for the city, although also done for the purpose of the railway, and if the plaintiff can make it appear that by reason of the lowering or raising of the grade his property has been injuriously affected, his right is to claim compensation from the municipality: *Pratt v. Stratford*, 14 O. R. 260, 16 A. R. 5; *Baskerville v. City of Ottawa*, 20 A. R. 108.

There is nothing in the agreements between the city of London and the defendants or in the by-law No. 922 and the agreement entered into in pursuance thereof, which plaintiff invokes, to prevent the city of London from authorizing the defendants to lay a second track or double line upon or along Railroad street. And if the city has deemed it proper to do so, the plaintiff is not in a position to complain of it in this action.

Then a track laid upon the highway in a proper manner, and in accordance with the usual methods stipulated for by the municipality, is not such an obstruction as to constitute a public nuisance. And if it were, the plaintiff is not entitled to the intervention of the Court, for he fails to shew any special injury to himself. The track is not yet laid, and until it has been it is impossible to say that it is an obstruction or a public nuisance. The work, as done, does not touch the plaintiff's property, and, as before stated, if it has been injuriously affected, the remedy is a claim for compensation against the municipality, and not a claim for damages.

Appeal dismissed with costs.

NOVEMBER 16TH, 1903.

C.A.

McKENNY v. LYALL.

Master and Servant—Injury to Servant — Death — Action by Widow — Workmen's Compensation Act — Defect in Condition of Plant—Negligence.

Appeal by the defendants from the judgment of MEREDITH, J., at the trial, upon the findings of the jury, in favour of plaintiff in an action to recover damages for the death of her husband, who was killed on the 21st March, 1902, in consequence of the mast of a derrick falling on him. The defendants were his employers, and the derrick was part of the machinery and plant used by them in their business.

E. E. A. DuVernet and D. C. Ross for appellants.

C. Millar, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.,) was delivered by

OSLER, J.A.:—The question was whether the deceased sustained the injury which caused his death, by reason of some defect in the condition of the plant, which arose from or had not been discovered or remedied owing to the negligence of the employers, or of some person intrusted by them with the duty of seeing that the condition or arrangement of the plant was proper: Workmen's Compensation Act, secs. 3 (1), 6 (1).

The derrick was built in 1889 or 1900, for the Sturgeon Falls Pulp Co., and was acquired by the defendants in March, 1902. It was removed by them from its original anchorage

and re-erected on the place where it afterwards fell. The mast was supported by two stiff legs, which were firmly anchored by stones and cross-legs, between two of which the leg afterwards referred to was bolted by a steel bolt, 1 inch and 3-8 in diameter, passing through the legs. After it had been in use some time, the iron which connected one of the legs with the top of the mast broke, and it became necessary to renew it and also to make a change in the leg, as it did not work properly at its junction with the mast. Accordingly it was taken down, the leg shortened by cutting off 7 inches or a foot at the bottom, and reset, and bolted in the anchorage. Another hole was bored in it for passing the bolt through, 6 or 7 inches higher than the other. This was done by and under the superintendence of the defendants' foreman and two workmen. In its altered condition the derrick continued to be worked until the 21st March, when it broke down and killed the plaintiff's husband in its fall, as already stated. It was then lifting on the platform or basket attached to the boom, a comparatively small load of about 1,200 lbs. weight. The leg which failed, and in doing so brought down the whole machine, was the one which had been reset. On examination it was found that the steel pin passing through the leg and the anchor logs has been broken in two, and had torn its way through the leg. The other leg, being unable to support the whole weight thus thrown upon it, broke off at its anchorage, and the whole fell down.

For the defence it was strongly contended that the accident was due to a latent defect or flaw in the steel bolt, which could not have been discovered by any reasonable inspection. And several witnesses proved, what was not indeed denied, that a flaw or crack was found in the bolt, from its rusty appearance of some days' standing, and extending through nearly one-half of its diameter. The plaintiff on the other hand gave evidence from which it might be inferred that the real cause of the accident was the improper setting of the stiff leg in its anchorage weakening it by cutting it off too close to the hole through which the bolt had at first been passed, by making the second hole too large for the bolt, thus admitting of a play or movement which would bring an excessive strain upon it, and by setting the leg, instead of parallel to the anchor logs, and in the same plane as the mast, at an angle thereto which would cause a strain upon the leg at its weakest point whenever the boom swung round with the dump.

The view of each party was fully and fairly submitted to the jury by the learned Judge, in a charge which was not

open to objection, and in which the considerations—not light ones, no doubt—in favour of the defendants' side were emphasized. The answers of the jury are supported by the evidence, and cannot be disregarded merely because we may think that the questions would have been more satisfactorily answered the other way.

I think the answers to questions cover everything that is necessary to make out a case against the defendants under the Act, and would therefore dismiss the appeal with costs.

NOVEMBER 16TH, 1903.

C.A.

FURLONG v. HAMILTON STREET R. W. CO.

Street Railways—Injury to Person Crossing Track—Collision—Negligence—Excessive Speed—Absence of Light—Neglect to Give Warning—General Verdict—Request to Put Questions Refused—Conflicting Evidence—Excessive Damages—New Trial—Discretion.

Appeal by defendants from judgment of BOYD, C., in favour of plaintiff, upon the verdict of a jury, for \$850 and costs.

J. Crerar, K.C., and T. H. Crerar, Hamilton, for appellants.

E. E. A. DuVernet and D. C. Ross, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.,) was delivered by

GARROW, J.A.:—On the evening of 21st November, 1902, a few minutes before six o'clock, plaintiff was driving a team of horses attached to an empty lorry along Jackson street, in the city of Hamilton, which crosses James street, on which defendants have and operate an electric street railway. The horses were, as plaintiff alleges, going at a smart walk, and at that place, he says, commenced to cross James street in front of a car approaching from the south, which plaintiff says he did not observe until he had reached, and was in part upon, the track. He then urged his horses forward and had almost cleared, when the lorry was struck and plaintiff thrown out and injured. The lorry was not overturned or otherwise injured apparently, nor were the horses or harness.

The action is for negligence in the management of the car, and the particulars of the negligence complained of are

stated to be, excessive speed, no light in front of the car, no gong sounded or other warning given, and omission to bring the car to a standstill when the collision was seen to be imminent.

A teamster who passed over the track in the same direction just before plaintiff, saw the approaching car when it was, of course, further away than when plaintiff first approached the track. Plaintiff himself saw it as soon as he looked in that direction, and it was beyond doubt that he might have seen it in time to have stopped before entering upon the place of danger, or probably to have even passed over in safety, at a greater rate of speed. But plaintiff admits that he did not look in the direction from which the car was coming until his horses were actually upon the track, and when he then looked the car appeared to him to be about half a block or 150 feet distant. He at once, as he says, hurried up his horses, but before he got completely over the lorry was struck.

The evidence as to speed was, as usual, very conflicting, that of some of the witnesses for plaintiff going to shew that the rate was about 20 miles an hour, while those for the defendants place the utmost possible speed of the car, which was an old and defective one, at seven miles an hour on a level track, and its actual speed immediately before the collision at between 5 and 6 miles an hour. The car was stopped after the accident, within almost its own length from the place of collision, which seems inconsistent with any great degree of speed.

The absence of the headlight could scarcely have formed a decisive element in the matter (especially as it was otherwise lit up), because the teamster who passed immediately ahead of plaintiff could see the car up the track some 200 feet or more away—and plaintiff himself had no difficulty in seeing it when he looked. Nor, as the car was plainly in sight, could the alleged failure to sound the gong be a conclusive circumstance to establish the alleged negligence, even if it had been admitted, instead of being, as it was, strenuously disputed by defendants' evidence.

The plaintiff was earning at the time of his injuries \$9 a week as a teamster. His chief injury was a broken wrist, which at the time of the trial, or within 8 weeks from the injury, was making satisfactory progress towards complete recovery. Dr. Rennie, the plaintiff's own physician, gave it as his opinion at the trial that in a month or six weeks plaintiff would be fully recovered. The jury, upon a charge un-

objected to, gave a verdict for the very considerable, if not excessive, sum of \$850. The Chancellor, although requested, declined to submit questions.

The defendants' appeal is based chiefly upon the contentions: (1) that there was no proper evidence of negligence to be submitted to the jury; (2) that it was the duty of plaintiff to have looked along the track before attempting to cross, and that by his failure to look he brought the injury on himself; and (3) that in any event the damages are grossly excessive.

It may sound like being wise after the event, but I cannot help thinking that it is unfortunate that what is now the usual course of submitting questions to the jury in such actions as the present, was not followed in this case. Was the speed of the car 5 or 20 miles? Was plaintiff travelling at a smart walk or a brisk trot? Was the car 150 feet or 15 feet from him when he looked? Could plaintiff by looking while in a place of safety have seen the approaching car? Could defendants' servants, after seeing plaintiff and his lorry, have pulled up the car and avoided the collision? Had these or some similar questions been submitted and answered, the judicial task of applying the law would have been reasonably free from difficulty. As it is, while the mere refusal to submit questions may not be enough to justify a new trial, still, I think, having regard to this and to the conflict of evidence, which for obvious reasons I do not discuss in detail, and to the largeness of the verdict, it is not too much to say that the result is not a satisfactory one. . . . A proper case is made for the exercise of our discretion in ordering a new trial; the costs of the former trial and of this appeal to be costs in the cause.

NOVEMBER 16TH, 1903.

C.A.

EACRETT v. GORE DISTRICT MUTUAL FIRE INS.
CO.

Fire Insurance—Statutory Condition 9—Variation by Special Condition—Application to Partial Loss of Goods Insured—Overvaluation in Application—Proportion of Actual Value.

Appeal by defendants from the judgment of MEREDITH, C.J., in favour of plaintiff in an action upon a policy of fire insurance.

W. R. Riddell, K.C., and H. E. Rose, for appellants.

G. C. Gibbons, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

MACLENNAN, J.A.—. . . The insurance was upon goods, valued in the application at \$15,000. The policy was dated 11th June, 1902, and the fire occurred on the 12th July following, with a loss of \$6,250. Defendants' policy was for \$3,000; there was other insurance to the amount of \$7,000; and the total value of the goods at the time of the fire was \$9,374.62. . . .

The Chief Justice decided that the plaintiff was entitled to recover three-tenths of the loss, that being the proportion of defendants' policy to the whole amount of insurance.

Statutory condition 9 reads as follows: "In the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies."

There were also indorsed on the policy, in the method prescribed by the statute, certain variations and additions to the statutory conditions, among others the following: ". . . The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in the case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value as represented in the application shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings, if the property insured is found by arbitration or otherwise to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application." . . .

The special condition consists of two distinct parts, of which the first is applicable to an insurance of a building, and is not at all applicable to the insurance of goods. . . . It is only the second part which is applicable to the insurance of goods. But it is evident that in order to ascertain the meaning of the second part it must be read in the light of the first, for what it declares is, that the company shall be liable for a certain proportion, not of the loss, but of the actual value. If there has been overvaluation in the appli-

cation, then the liability is to be a proportion of the actual value. The company is apparently guarding itself against liability to pay a proportion of the value stated in the application; that is innocent overvaluation by the assured. Now, it is only in case of a total loss that a proportion of the actual value is to be paid. In other cases it is a proportion of the loss. If there had been a total loss here, then this part of the condition would have been distinctly applicable, and the defendants would have been liable for three-tenths of the actual value, that is, the proportion which the amount insured by all the companies bore to the value in the application. That is the plain meaning of the first part of the condition in the case of a building where not more than two-thirds of the value as represented in the application has been insured. The language of the two parts of the condition is identical, and must receive the same construction; and it being clear, as I think it is, that in the case of a total loss the defendants would have had to pay three-tenths of the whole, it would be a strange result that in the case of a partial loss they should be liable to a less proportion. The only other construction of which the words admit is that defendants should pay, not as provided in the 9th statutory condition, a ratable proportion of the loss with the other companies, but three-tenths of the actual value, or \$2,819.44.

For these reasons the special condition is inapplicable to the case of a partial loss, and the judgment should be affirmed.

NOVEMBER 16TH, 1903.

C.A.

EACRETT v. PERTH MUTUAL FIRE INS. CO.

PERTH MUTUAL FIRE INS. CO. v. EACRETT.

Fire Insurance—Misstatement as to Value of Goods Insured—Circumstance Material to Risk — False and Fraudulent Representation—Mistake of Agent—Cost or Selling Value of Goods—Approximately Correct Statement.

Appeal by the insurance company from judgments of MEREDITH, C.J., in favour of plaintiff in the first action for \$1,250, and dismissing the second action.

The first action was upon a policy for \$2,000, dated 3rd June, 1902, on a stock of goods partly destroyed by fire on the 12th July, 1902. The second action was to have the same policy declared void. The insurance company set up in both

actions (1) that, in violation of the first statutory condition, the assured, in his written application, caused his goods to be described otherwise than as they really were, to the prejudice of the company, by describing them as of the value of \$17,000, whereas they were of a value not greater than \$9,374.82; (2) that he omitted to communicate to the company a circumstance material to be made known to them, in order to enable them to judge of the risk, namely, that the goods, while already insured for \$8,000, were of the value of \$9,374.82 or less; (3) that the insured had falsely and fraudulently represented the value of his stock to be \$17,000, and thereby induced the company to issue the policy.

W. R. Riddell, K.C., and G. G. McPherson, K.C., for the appellants.

G. C. Gibbons, K.C., for the respondent.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

MACLENNAN, J.A.—The policy in question was for \$2,000 for three years from 3rd June, 1902, and there was \$8,000 concurrent insurance.

On the 3rd June one Ellis, an agent of the company, applied to the assured to increase his insurance with the company by the further sum of \$2,000, which he agreed to do. Ellis thereupon produced one of the company's forms of application, and filled it up, and it was signed by the assured without reading it. On the same day Ellis sent the application to the head office, with a letter stating that the assured's "stock now amounted to about \$14,000, and I trust you will be able to accept the risk." This was declined, objection being made to the rate of premium stated in the application, \$60. After some further correspondence between the company and their agent, the risk was accepted at a premium of \$80, and the policy was issued on the 18th June. No new application was signed by the assured, nor was the original application altered with his knowledge or consent. When produced at the trial the application contained the figures \$17,000 in a column expressed to be the present cash value of the stock, but it is proved, and the Chief Justice has found, that these figures were not contained in the original application, but were inserted afterwards in the company's office, together with some other additions and alterations. The original application was for an insurance for 12 months, afterwards altered to 36 months, and none of these alterations were made by Ellis, although presumably the change of the insurance from 12 to 36 months must have been orally assented to by the assured.

The only reference to \$17,000 which the original application contained was in the answer to these questions: "When was stock last taken? Last year. What was the amount? \$17,000." Mr. Ellis in his evidence says this was a mistake made by him, and that he intended \$14,000 and not \$17,000. He says that what the assured told him at the time he was filling up the application was that his stock was about \$14,000. This is confirmed by the evidence of the assured, and accords with Ellis's statement in his letter of 3rd June, and is further corroborated by his letter of 23rd July to the company, written long before the commencement of the actions, asserting that he had made a mistake in the application, and that he intended \$14,000 and not \$17,000.

Under these circumstances the 1st and 3rd defences of the company utterly fail. . . . To say, as the application did say, though by mistake of the agent, that at the last stock taking the value was \$17,000, was no representation of the present value, while the blank for the present cash value was left unfilled. . . .

The policy provides that in case of loss or damage it is to be estimated according to the actual cash value at the time of the fire, which shall in no case exceed what it would then cost to replace the same, deducting therefrom a suitable amount for any depreciation.

Now, what he told the agent, and what the agent immediately communicated to the company, was that the stock then amounted to about \$14,000. He says that at the time of the application he shewed Ellis his stock book, and Ellis says he may have done so, and that he will not say he did not. The stock was taken at selling prices, and according to the stock book was \$15,867, besides a further sum of \$2,054, which included fixtures of the value of about \$1,000, so that, according to the stock book, the value of the goods at selling prices at that time was \$16,921. . . . In his evidence the insured says that a fair deduction in order to get at the wholesale value would be 20 per cent., and if that is deducted it leaves \$13,537, which, I think, may fairly be said to be about \$14,000. But it would not have been wrong if the assured had valued his goods at selling prices, . . . although the policy provides for a settlement at wholesale or cost price. Even the words in the application "present cash value" might reasonably have been answered by the selling prices which were being got for the goods every day, and, in the absence of a stipulation to the contrary, the assured might reasonably claim the selling prices to be the measure of his loss.

But after the fire a Mr. Kennedy, a professional adjuster of fire insurance losses, of many years' experience, came to examine the claims, and he discovered an error in the stock book of \$1,878 at selling prices. Deducting that from \$16,921, it leaves \$15,043, the value at selling prices, or in round numbers \$12,000 at cost.

Now, what the company says is, that the assured should have informed them that the value of his stock was \$9,374 or less, and that the omission to do so invalidated the insurance. I do not think that charge is supported by the evidence. What he did was to shew them his stock book and to say that the value was about \$14,000. The agent had the means of seeing, and must upon the evidence be taken to have seen, that the stock was taken at selling prices, and, having regard to all the circumstances, I think the expression "about \$14,000" was a fair statement and honestly made, and was not a withholding of a circumstance material to be communicated.

It is true that, for the sake of a settlement with all the companies, the assured agreed to do so on a basis of a cost value of \$9,374, after a deduction of 30 per cent. from cost price, the cost price being taken at \$13,391; but that was clearly a compromise and still leaves his original statement of value of "about \$14,000" fairly and reasonably accurate.

Appeal dismissed with costs.

NOVEMBER 16TH, 1903.

C.A.

BENTLEY v. MURPHY.

Ship—Contract to Sell—Co-owners—Partnership—Authority of one Co-owner to Bind the other—Ratification—Specific Performance—Contract under Seal—Co-owner not Named—Principal and Agent—Evidence of Agency—Bill of Sale—Possession.

Appeal by plaintiffs from judgment of a Divisional Court, 1 O. W. R. 726, reversing judgment of BRITTON, J., 1 O. W. R. 273. The action was by the vendees to enforce specific performance of the sale of a ship called the "Island Queen."

L. G. McCarthy, K.C., and A. M. Stewart, for appellants.

C. H. Ritchie, K.C., for defendant Craig.

L. V. McBrady, K.C., for defendant Murphy.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., and TEETZEL, J.) was delivered by

GARROW, J.A. (after stating the facts at length):—The action is brought, and so put in the statement of claim, upon an instrument under seal; and a recovery against defendant Craig, who is not named nor in any way referred to in it, would be clearly in contravention of the well known rule of law that only the parties to the deed itself, or their privies claiming through them by blood, representation, or otherwise, can sue or be sued upon it: *Chesterfield Colliery Co. v. Hawkins*, 3 H. & C. 677. Nor has this rule been affected by the fusion of legal and equitable principles under the Judicature Act, unless the facts disclose the relationship of trustee and cestui que trust, which is not the case here: *Gandy v. Gandy*, 30 Ch. D. 57; *Edmison v. Couch*, 26 A. R. 537.

It is well established that an agent to bind his principal by the execution of a deed must execute in the name of the principal, and further, that the agent must have been himself appointed by deed. Neither of these circumstances exists in the present case.

Had the instrument been executed in the name of defendant Craig, evidence might properly enough have been received to prove that he had admitted Murphy's authority or had adopted the deed: see *Tupper v. Foulkes*, 9 C. B. N. S. 797. But no admission or adoption could, in my opinion, be held to convert that which is plainly on its face the deed alone of Murphy into the deed of Craig or of Murphy and Craig. Nor can it, in my opinion, make any difference that the contract could have been well executed as a simple contract, and that the seals were wholly unnecessary for its validity. . . . But, although a deed was unnecessary, I know of no safe authority which would justify me in ignoring the form in which the parties deliberately chose to express their contract. because now that form is found to be inconvenient or to lead to consequences not contemplated. It is true that in *Evans v. Wells*, 22 Wend. N. Y. St. 324, it is apparently laid down as the law in that State that, while the rule that a contract under seal entered into by an agent, to be binding on his principal, must on its face purport to have been made by the principal, and to have been executed in his name and not in the name of the agent, is applied in all its rigour when the validity of the instrument depends upon the annexation of a seal, in less formal writings, if it can upon the whole instrument be collected that the true object and intent were to bind the

principal, and not merely the agent, Courts of justice will adopt that construction of it, however informally it may be expressed. But, even with the wider rule of construction suggested by the case just cited, a rule, so far as I have been able to see, not adopted or followed in England or Ontario, the plaintiffs would still fail because it could not be collected *from the whole instrument* that the true object and intent were to bind defendant Craig as well as defendant Murphy, for the simple reason that there is not the most remote reference in it to defendant Craig. See *Broomley v. Grinton*, 9 U. C. R. 455; *Moor v. Boyd*, 23 U. C. R. 459. . . .

At present defendant Craig has a judgment in his favour, and, speaking for myself, I think that judgment should not be converted into one against him except upon legal evidence (which, in my opinion, all the evidence given as to agency and ratification was not), whether the inadmissible evidence was objected to when tendered or not, this having been a trial without a jury. See *Jacker v. International Cable Co.*, 5 Times L. R. 13; *Merritt v. Hepenstal*, 25 S. C. R. 150.

In the view which I take, it is unnecessary to express any opinion upon the question of agency or ratification, but I may say that . . . I would have had upon the merits great and perhaps equally insuperable difficulty in adopting plaintiffs' contention that upon the proper construction of the contract they were entitled to call for a bill of sale, or for anything more than mere possession, until the whole purchase money was paid. . . . The defendants, having offered to deliver possession, but proposing to hold the bill of sale until payment in full, had offered all that plaintiffs were entitled to, and were in no default when the action began. . . . It is a good defence to the action and an additional reason why plaintiffs' appeal should be dismissed. See *Godwin v. Collins*, 4 Houston (Del.) 28.

Appeal dismissed with costs.

NOVEMBER 16TH, 1903.

C.A.

WALKERVILLE MATCH CO. v. SCOTTISH UNION
INS. CO.

*Fire Insurance—Contract—Authority of Agent—Sub-agent—
Notice of Termination of Authority.*

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., dismissing without costs an action to recover \$3,083.45

under a fire insurance contract in respect of plaintiffs' factory and contents at Walkerville. The defence was that defendants had not issued a policy, and that they were not bound by a receipt issued in the name of one Davis, who had been an agent, but had been superseded.

A. H. Clarke, K.C., for appellants.

O. E. Fleming, Windsor, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

MACLENNAN, J.A. (after setting out the facts at length):—It is argued on behalf of the plaintiffs that no notice having been given by defendants that Davis was no longer their agent, Morton, acting on behalf of plaintiffs, had a right to assume that the agency continued. It is admitted that Morton was ignorant of any change. . . . Whatever might have been the proper conclusion if the policy had been signed by Davis himself, the real question for determination is, whether defendants are bound by a policy not signed by Davis himself, but signed by Mezger with Davis's name, without any authority whatever from him, and wholly without his knowledge or privity. Assuming that, in the absence of notice, Morton had a right to deal with Davis as defendants' agent, he did not in fact deal with him, but with one who never was defendants' agent at all. Davis was the man they had trusted.

The position of an insurance agent is one of responsibility, involving careful and prudent conduct in the transaction of business. The policy expressly required the counter-signature of the agent as a guarantee of the desirableness and prudence of undertaking the risk. Under these circumstances I think Morton was bound to see that Mezger had express authority from Davis to append his signature to the policy, and not having done so, he and the plaintiffs accepted the policy at their own risk, and Mezger not having any such authority, the plaintiffs cannot recover. This conclusion depends on a familiar principle, *delegatus non potest delegare*. . . .

[Reference to Leake on Contracts, 7th ed., pp. 401-2; Broom's Legal Maxims, 7th ed., p. 638.]

I think the present case comes within the rule and not the exception.

Much was made in argument by appellants' counsel of the letter of 3rd February, written by Rogers (defendants' district agent) to the head office of defendants, as evidence of the

authority of Mezger to act for them. But . . . what was expected and approved of, as expressed in that letter, was that Mezger should act under Mallett (the new agent), and not any longer under Davis.

Appeal dismissed with costs.

NOVEMBER 16TH, 1903.

C.A.

McAVITY v. JAMES MORRISON BRASS MFG. CO.

Patent for Invention—Trade Mark Used in Connexion with—License—Option—Agreement—Construction—Declaration of Rights—Specific Performance—Injunction—Misconduct Disentitling Party to Equitable Relief—Counterclaim—Reservation of Rights—Res Adjudicata.

Appeal by defendants from judgment of MEREDITH, C.J., ante 156, in favour of plaintiffs in an action for a declaration that plaintiffs T. McAvity & Sons were the only persons entitled to manufacture and sell the Hancock Locomotive Inspirators in Canada, and an injunction restraining defendants from manufacturing and selling, or representing that they had the right to manufacture and sell, the articles in question, and for damages.

G. H. Watson, K.C., and Grayson Smith, for appellants.

L. G. McCarthy, K.C., and A. M. Stewart, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.) was delivered by

GARROW, J.A. (after stating the facts at length):—At the trial it appeared that the articles called “inspirators,” covered or intended to be covered by patent No. 7011, were intended to be applied only to stationary engines, while those covered by the latter patent (No. 44062) are intended for locomotive engines, and are called “locomotive inspirators,” and one of the arguments addressed to us on behalf of the plaintiffs on this appeal was, that the second is not in any sense an “improvement” upon the first, within the meaning of that word as used in the agreement of 10th March, 1886, but an adaptation of the same idea to a totally different subject matter, . . . but, in the view which I take of the whole matter, it is not, I think, necessary to pronounce any opinion upon that question. Nor is it necessary to determine whether or not the patent 44062 is or is not valid, or whether

we have the power in this action to try its validity, because, in my opinion, the plaintiffs' rights would be the same whether the last mentioned patent is or is not valid, inasmuch as it is quite apparent that plaintiffs are not complaining of an infringement of the patent, but of an illegal use of a trade mark and of an advertising and holding out of an exclusive agency which they say does not exist, to the injury of the plaintiffs' trade and business.

The injurious acts complained of by plaintiffs are really not in dispute, and it is clear that the defendants' only possible justification is to be found, if at all, in the provision for an option contained in the agreement of 10th March, 1886.

The defendants contend that, having this option, they are, on equitable principles, entitled to be placed in the same position as if it had been implemented by an agreement wide enough to cover and justify the otherwise wrongful acts which they admit they have committed.

This to me would be, in the circumstances, an extraordinary application of the well known equitable maxims that "he who seeks equity must do equity," and "equity looks upon that as done which ought to have been done." But, if an appeal is to be made to the maxims, there is still another which, I think, has some application, namely, that "he who comes into equity must come with clean hands," and obviously the latter maxim lies at the portal and must be passed before we reach the others which defendants invoke. I do not wish to say anything harsh, but to me it would be extremely difficult to make the defendants' somewhat furtive and underhand conduct in obtaining from plaintiffs the sample machine, and in afterwards making from it the others, afterwards sold with plaintiffs' trade mark upon them, square with "clean hands" as understood by a Court of Equity. The obvious course would, I think, have been, if defendants were asserting or intending to assert a right under the agreement, to have reminded plaintiffs of its terms and demanded its fulfilment. But, even if plaintiffs had refused upon request to recognize the option, or to negotiate or offer to negotiate a new agreement, such refusal would not have justified defendants in proceeding to copy and to sell the machine as they did, whatever other rights or remedies they might have had upon such refusal. As pointed out by the trial Judge, the assignment of trade mark contained in the agreement of 10th March, 1886. was not, as so strenuously contended by Mr. Watson, an absolute assignment, but, on the contrary, was

expressly limited to the case of machines to be made under the earlier patent. . . .

It is also clear that the trade mark, as matters stood on 10th March, 1886, did not cover and could not have been intended to cover "locomotive inspirators," which had not at that time been invented, or at all events used or made by that company. It may be that, if defendants are entitled to the benefit of the so-called option, and under it, or an agreement made in pursuance of it, to make and sell locomotive inspirators, it would be held, as a necessary implication, that they are also entitled to the use of the enlarged trade mark. It is not, I think, necessary to determine that, but it is, I think, quite clear . . . that up to the present time defendants have no legal or equitable right whatever to the use of the plaintiffs' trade mark as applied to locomotive inspirators, or to the agency or other rights in respect to them which they claim, and that their defence to the action wholly fails.

But in dismissing the appeal I think it is only just to defendants to do so without adjudicating in any way upon defendants' rights, if any, under the agreement of 10th March, 1886, further than, as I have indicated, that nothing in it affords any answer to plaintiffs' claim. A declaration of this kind, to prevent the matter from becoming *res adjudicata* by reason of having been set up in the counterclaim, may be inserted in the certificate of dismissal, if defendants so desire. The appeal otherwise should be dismissed with costs.

NOVEMBER 16TH, 1903.

C.A.

WATTS v. SALE.

Chattel Mortgage—Seizure under—Breach of Trust—Injunction — Damages — Counterclaim — Compensation of Trustee—Costs.

Appeal by plaintiffs from judgment of FALCONBRIDGE. C.J.. 1 O. W. R. 681, dismissing action for damages for taking possession of a laundry business in the city of Windsor under a chattel mortgage, which plaintiffs alleged was a breach of trust, and directing a reference to determine the amount of defendant's compensation and disbursements as trustee.

W. R. Riddell, K.C., and R. McKay, for plaintiffs.

F. A. Anglin, K.C., for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.) was delivered by

MACLENNAN, J.A. (after stating the facts at length):—The proper conclusion is that defendant dismissed Hanrahan, who was in possession as manager for the true owner of the property, because he had telegraphed to him what had taken place on the previous day, and deliberately refused to deliver possession of the trust property to an agent duly authorized to demand it by his cestui que trust.

I think that conduct on the part of the trustee was inexcusable and a breach of trust. There were some costs at that time due to defendant arising out of the trust, but I am not aware that that is any justification for a trustee turning his cestui que trust out of possession. But, if it were, the defendant declares emphatically . . . that these costs had nothing whatever to do with his action.

On the following day the plaintiffs' solicitors demanded that possession should be delivered to Schwarte on behalf of both the mortgagor and the mortgagee, and threatened proceedings in case of refusal. This was answered by a refusal until settlement by Mr. Watts of defendant's claims against the property and against Mr. Watts. . . .

I think it is clear that the position taken by the defendant in that letter was untenable. Until 3rd March the possession was the possession of Mr. Watts. On that day defendant took possession adversely to him, without any right to do so, and if he made advances afterwards he did so as a wrongdoer, and no legal claim could arise out of that, either for advances or for his general bill of costs.

On the following day this action was commenced, and an injunction was granted by the local Judge to restrain defendant from taking possession of the property. That injunction was, on terms, continued to the hearing; and defendant withdrew from possession on 23rd March afterwards.

I think the injunction was properly granted, and that the trial Judge should have made it perpetual at the hearing.

The appeal in the action should, therefore, be allowed with costs, both here and in the Court below.

With regard to plaintiffs' claim for damages and defendant's counterclaim for commission or compensation as trustee, the one may be set off against the other.

Defendant's claim in respect to the indemnity bonds will be dismissed, and there will be a reference to take an account of defendant's alleged advances over and above his receipts, in

carrying on the laundry business, or for the purposes thereof, but not including any payment for the services or expenses of the bailiff.

There will be no costs of the counterclaim either here or below, and further directions and costs of the reference will be reserved.

NOVEMBER 16TH, 1903.

C.A.

RANDALL v. OTTAWA ELECTRIC CO.

Negligence—Injury to Linesman of Electric Company—Negligence of Strangers—Duty Owed by—Precautions against Danger—Volunteer or Licensee—Jury.

Appeal by defendants Ahearn & Soper from judgment of a Divisional Court, ante 146, dismissing the appellants' motion for a judgment dismissing the action upon the findings of the jury. The action was by a linesman in the employment of defendants the Ottawa Electric Co. to recover damages for injuries sustained in the course of his employment. The trial Judge nonsuited plaintiff as against the company, but as against Ahearn & Soper left three questions to the jury, in answer to two of which they found that negligence of Ahearn & Soper was the proximate cause of plaintiff's injury, and that the negligence consisted in using uncovered wires and careless construction of tie-wires. They did not answer the third question, which was, whether plaintiff might, by the exercise of ordinary care, have avoided the injury. The trial Judge treated the result as a disagreement of the jury, and the Divisional Court held that he was right, and that there was evidence against the appellant, to go to the jury, and therefore that the case should go down for a new trial. The appellants subsequently moved for and obtained leave to appeal from the judgment of the Divisional Court, upon terms mentioned in the judgment by which leave was granted (ante 173), one of which was that for the purposes of the appeal and of the action the third question submitted to the jury was to be taken as having been answered in the negative.

W. R. Riddell, K.C., and C. Murphy, Ottawa, for appellants.

H. M. Mowat, K.C., and A. E. Tripp, Ottawa, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.) was delivered by

OSLER, J.A.—The questions which arise . . . are:

(1) Whether in respect of the way in which the defendants put up their wire they owed any duty to a person in the situation of the plaintiff, the servant of other employers, who had, so far as it appears, no authority to use the North-West Telegraph Company's poles for the purposes of their business. (2) If there was any such duty, whether it was different in any respect from that of his own employers, having regard to the plaintiff's obligation towards them to use the ordinary means of protection against danger. (3) Whether the plaintiff is not to be regarded as the author of his own injury by reason of his failure to employ them.

The case appears to me to turn substantially on the first question.

If the transformer had been put up by the Ottawa Electric Company under their contract with the defendants in order to supply the power to their wires. as the judgment below assumes, there would be no difficulty in affirming the existence of a duty towards the workmen of the electric company to take care that their wires were put up in a safe and careful manner. There is some evidence of the assent of the telegraph company to the temporary user by the defendants of the pole or that company for the purposes of their contract, and this might well be taken to imply assent to the doing of whatever was necessary to be done by any one in order to make the wires effective. In that case the plaintiff would, as regards the defendants, have been lawfully working on the pole, and their duty would be to take care that their wires were in a reasonably safe condition for a person in his situation engaged upon an employment in which they were interested. It is, however, stated in the reasons of appeal, and was again urged before us and not denied, that there is a misapprehension in the judgment on this point, and that the putting up of the transformer had nothing to do with the defendants' business. It was put up by the Ottawa Electric Company solely in connexion with their own business arrangements for supplying light to Victoria Chambers. This, indeed, was stated by counsel for the plaintiff in opening the case to the jury, and there is in fact nothing to connect the work which the plaintiff was doing with the defendants.

On this state of facts it appears to me that the plaintiff had failed to prove any negligence on the defendants' part towards the workmen of the electric light company, or the

breach of any legal duty owed by them to persons in the situation of the plaintiff. The electric light company had their own pole, which ought to have been used by their workmen, but these, for their own convenience, as it must be assumed, and at all events without any permission from the telegraph company, chose to use and work upon the pole of that company among the wires which the defendants had placed upon it. As regards the defendants, I think the plaintiff was a mere volunteer—a person on the pole without any license or authority—and, apart from any question of his own negligence, he took the risk of these wires being out of order or imperfectly insulated. He cannot be said to have been invited by defendants to use the pole, or to have had the license or permission of its owner to do so. The wires put up by the defendants were their own wires put up for a temporary purpose of their own, and they had no reason to anticipate that the workmen of the electric light company would be employed upon the pole. I refer to the cases of *Indermaur v. Dames*, L. R. 1 C. P. 274, 2 C. P. 311; *Gontrel v. Egerton*, L. R. 2 C. P. 371; *Smith v. London and St. Catharines Dock Co.*, L. R. 3 C. P. 326; *Batchelor v. Fortescue*, 11 Q. B. D. 474; *Tolhauser v. Davis*, 58 L. J. Q. B. 98; *O'Neil v. Everest*, 61 L. J. Q. B. 453.

But, even if it could be inferred that the plaintiff, as a workman of the electric light company, was upon the pole in the character of a licensee, or that the defendants had reason to suppose that such a person would be making use of their wires, or of the telegraph company's pole, I should be of opinion that the plaintiff is shewn by the evidence to be the author of his own wrong—to have brought his injury on his own head by the omission to employ the usual means of protection against danger from electric shock. The possibility of danger was well known to him. His obligation to his own employers, and the instructions which as regards them he was bound to observe when working among or near wires, are proper to be considered as regards both his appreciation of danger therefrom, and the means he had in his power of avoiding it. The unfortunate man seems to have been as reckless as his fellow-workmen in working among the wires without his gloves. I can see no reason suggested in the evidence as a possible excuse for his having done so, or for saying that his injury was not attributable directly and approximately to that, rather than to any negligence on the part of the defendants. The cases of *Paine v. Electric Co.*, 7 Am. Elec. Cases 657, and *Cann v. Electric Co.*, ib. 746, are quite different in their facts from the case at bar, and the evidence

there was such as properly to reduce the omission of the workman to wear gloves to one of contributory negligence for the consideration of the jury.

On the whole I think the appeal should be allowed, and the action dismissed.

NOVEMBER 16TH, 1903.

C.A.

CENTAUR CYCLE CO. v. HILL.

Sale of Goods—Action for Price—Counterclaim for Damages—Substitution of Inferior Material in Manufactured Articles—Warranty—Resale with Like Warranty—Delay in Furnishing Goods—Measure of Damages—Costs.

Appeal by defendant Hill and cross-appeal by plaintiffs against the judgment of BOYD, C. (10. W. R. 229), on appeals by both these parties from a Referee's report, and from the judgment of BOYD, C., on further directions.

The action was for the price of goods sold and delivered by plaintiffs, who were bicycle manufacturers, carrying on business at Coventry, England, against Hill & Love, dealers in bicycles, carrying on business at Toronto. After the dealings in question had taken place defendant Love retired from the firm, defendant Hill agreeing to pay plaintiffs' claim, if any.

E. B. Ryckman and C. W. Kerr, for defendant Hill.

N. W. Rowell, K.C., and Casey Wood, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

GARROW, J.A.—The questions to be considered are those relating to the alleged representation or warranty by plaintiffs as to quality; the failure by plaintiffs to deliver the samples, and, later, the bulk of the order at the terms agreed upon; the substitution by plaintiffs of the 1896 sprocket wheel for that of 1897; the omission by plaintiffs to forward the spanners; and the defects in the ball bearings. As to the three latter matters, I do not feel convinced that the disposition of them by the Chancellor is not, upon the whole, the proper one, and I do not, therefore, propose to interfere with his judgment as to them. There remain to be considered the two important questions of what are the rights and liabilities of the parties arising out of the substitution by plaintiffs of

cast for wrought connections, and of the amount, if any, which should be allowed to defendants for plaintiffs' delay in delivering.

The Referee found upon the evidence that by the contract between plaintiffs and defendants the plaintiffs agreed that the bicycles ordered by defendants, which plaintiffs were to manufacture for them, would be made with connections of forged steel, and that, in violation of their contract, plaintiffs used castings for some of such connections, instead of forgings, and that it was proved before him that the cost of forgings exceeds that of castings, and increases the value of the machine by at least \$10 on each machine and that the number of the machines upon which this sum would be payable is 290, if the Court should be of opinion that defendants are entitled to recover on this account.

A careful perusal of the evidence has fully convinced me that the Referee's findings are amply justified. Nor do I understand the learned Chancellor to have been of a contrary opinion, although on the motion for judgment he declined to allow to defendants the damages upon this head so found by the Referee, largely, if not wholly, because defendants sold the machines with a like warranty, and no claim had been made by any sub-purchaser against defendants upon their warranty, although in the judgment a reservation in favour of defendants is made of a right, if any such claim is made, to reclaim in respect of such damages from plaintiffs; and the real question in this appeal, as to this item, is, was that a proper adjudication as between the parties?

In my opinion, and with deference, I think it was not, and that defendants are entitled to have the damages so found in their favour applied at once in reduction of plaintiffs' claim. I am wholly unable to see any reason why this case should be treated in an exceptional manner. The substitution in question was a somewhat bold one, treated at first defiantly and as calling for no answer, resisted before the learned Referee as long as possible, and until a large amount of evidence, expert and otherwise, had been called to prove the fact, when, the fact having become apparent, a somewhat lame and halting admission or explanation was stated to the Referee by counsel for plaintiffs to the effect that, as advised in a recent letter from plaintiffs, they admitted that in the press of business some castings might have been used in place of the forgings called for by the contract. Viewed in the light of the high sounding pretensions made by plaintiffs, in their printed catalogues, of the advantages of steel forgings over castings, and their scorn of 'so-called "American shoddy

methods" for cheapening construction by the use of castings, the mistake, if it was only a mistake, was a most unfortunate one, leaving, as it does, room for a strong suspicion, at least, that "shoddy methods" are not confined to America.

The substitution in question was a most difficult one to discover, and was, in fact, not discovered until after all the goods in question had been taken into stock, and most, if not all of them, sold. If defendants had discovered the substitution in time, they would clearly have been entitled to refuse to accept, the warranty or representation standing in that connexion and up to that time in the nature of a condition precedent. . . . *Bowes v. Shand*, 2 App. Cas. 445, 480, referred to.

But if, having taken the article, as in the present case, the purchaser afterwards discovers the defect, he may at once bring an action on the warranty, and recover the difference between the value of the article he should have received, and that which he actually did receive, at the time he received it: *Mayne on Damages*, 6th ed. p. 198; *Loder v. Kekule*, 3 C. B. N. S. 128, 139, 140; *Jones v. Just*, L. R. 3 Q. B. 197, 200, 201.

Nor can it make any difference to the vendee's rights that he has been fortunate enough to sell the goods as if they had complied with the vendor's warranty. If he sells without a warranty, the resale may, of course, assist in determining the amount of his damages, but, if the resale is made with a similar warranty, such resale is no guide even for such a limited purpose: *Muller v. Eno*, 14 N. Y. 597.

But the right of action is complete without a resale, and the measure of damages must be the same whether the goods are in the vendee's warehouse or in the hands of persons to whom he may afterwards have pledged or sold them. Where credit is given, or where the goods have been paid for, the vendee may sue at once, or if in the former case he so elects, he may await an action for the price, and in such action set off or counterclaim for his damages by reason of the defective material or other breach of warranty: *Mondell v. Steel*, 8 M. & W. 858; *Church v. Abell*, 1 S. C. R. 422; *Davis v. Hedges*, L. R. 6 Q. B. 687. This is an action for the price, and I fail to see any satisfactory reason why defendants should not be allowed to meet plaintiffs' claim, as far as they can, by the counterclaim for the damages in question.

As to the amount of the damages for plaintiffs' delay in delivering the goods . . . the amount allowed by the Referee was \$4,000, which the Chancellor reduced to \$1,000. By both it is apparently accepted as the proper conclusion

upon the evidence that there was actionable delay causing serious damage, and in this conclusion I agree without hesitation. . . .

The real question must be confined to the goods actually forwarded, received, and kept by defendants, namely, the 291 bicycles in all, of which they apparently sold 289 in the season of 1897. The defendants say that their usual selling prices were \$87.50 each at wholesale and \$110 at retail, and that they could have disposed of all these goods at these prices but for the delay in sending the samples, and later of the bulk, and that in consequence of such delays they were obliged to reduce their prices until in the result they made a loss from those prices on the 289 bicycles sold of \$3,795, of which the particulars are given in detail. But it appears that in the season of 1897 the competition, owing to the advent of large local manufactories, and of increased sales by the United States factories, was much more keen than in previous years, and this no doubt helped to reduce the selling price of the articles in question. This competition, however, although threatened early, apparently only developed as the season advanced, and it is, I think, quite probable that, had defendants' order been promptly filled, the samples placed early in their agents' hands, and sales pushed with reasonable vigour, many, if not all, of the bicycles in question would have been disposed of at or near the old standard of prices. . . . It is the case of goods ordered for a particular season arriving late for the season, and in consequence sold at more or less of a sacrifice. 'In such circumstances, it appears to me that a fair and reasonable measure of damages as against the defaulting vendor is to charge him with the difference between the value to defendants of the goods in question if they had been delivered according to the contract and their value for the purposes of resale, as plaintiffs well knew, at the time when they were actually delivered. That was the rule applied in *Wilson v. Lancashire and Yorkshire R. W. Co.*, 9 C. B. N. S. 632, and *Schulze v. Great Eastern R. W. Co.*, 19 Q. B. D. 30. . . .

Applying this rule or measure as well as I can to the actual facts, I have, after much consideration, come to the conclusion that the sum of \$1,000 allowed by the Chancellor is quite too little, and that, under all the circumstances, a fairer result would be to allow an average of \$10 on each of the 291 bicycles, or in all \$2,910, to defendants under this head of damage.

Defendants' appeal as to these two items allowed, and as to the other items dismissed. Plaintiffs' cross-appeal dismissed.

Defendants to have their general costs of the action, the reference, the appeal from the report, the motion for judgment on further directions, and the costs of this appeal, except in the case of the items on which they failed in the appeal before the Chancellor, as now confirmed. Plaintiffs to have the costs of an undefended action for the amount of their claim as now allowed. These to be set off against costs payable to defendants.

TEETZEL, J.

NOVEMBER 17TH, 1903.

TRIAL.

DOYLE v. DRUMMOND'S SCHOOL TRUSTEES.

Public Schools—Formation of New School Section—Award—Action to Set aside—Costs—Defendants Submitting their Rights.

Action by a ratepayer of public school section No. 8 of the township of Drummond, county of Lanark, to set aside the award of arbitrators appointed by the county council of Lanark, forming a new school section (No. 5) out of territory comprised in sections 8, 9, and 13 of that township. The defendants were the school boards of the three sections and individuals who were elected trustees of the proposed new section. At the trial the award was held invalid and the question of costs only reserved.

C. J. Foy, Perth, for plaintiff.

J. A. Allan, K.C., and A. C. Shaw, Perth, for defendants.

TEETZEL, J., held that none of the defendants was blameable for any of the errors which made the award invalid, and, as none of them endeavoured to support it either in their statements of defence or at the trial, but submitted themselves to the judgment and protection of the Court, there was nothing upon which to exercise a judicial discretion in favour of plaintiff against any of defendants. Judgment setting aside award without costs. *Re Southwold School Sections*, 3 O. L. R. 81, 1 O. W. R. 32, referred to.

TEETZEL, J.

NOVEMBER 17TH, 1903.

TRIAL.

HUNTER v. WILKINSON PLOUGH CO.

Chose in Action — Equitable Assignment — Consideration — Notice—Appropriation of Fund to Specific Purpose.

Interpleader issue (tried without a jury at Perth), directed to determine the ownership of certain moneys paid

into Court after an attaching order obtained by defendants upon moneys owing by Francis Hourigan to the common debtor, W. H. Perrin. The plaintiffs alleged that the moneys owing by Hourigan to Perrin were equitably assigned to them by Perrin prior to defendants' attaching order.

J. A. Allan, K.C., for plaintiffs.

R. B. Henderson, for defendants.

TEETZEL, J., held, upon the evidence, that what took place between the parties constituted an agreement between Perrin and plaintiffs that their claim, when ascertained, should be paid out of the moneys owing to him by Hourigan, that there was a good consideration for such assignment; that Hourigan was notified that the moneys were to be held by him for that purpose; and that there was, in effect, an appropriation of the moneys to satisfy plaintiffs' claim. The case was stronger than *Heyd v. Millar*, 29 O. R. 735. Judgment for plaintiffs with costs.

CARTWRIGHT, MASTER.

NOVEMBER 18TH, 1903.

CHAMBERS.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Judgment—Default of Appearance—Motion to Set aside Service of Writ of Summons—Stay of Proceedings—Irregular Judgment.

Motion by defendant to set aside a judgment signed by plaintiffs for default of appearance on the 6th November, 1903.

After the decision of the Master reported ante 941, the plaintiffs elected to take an order dismissing the defendant's application to set aside order for service of writ of summons out of jurisdiction, with costs to be costs in the cause, and filed a further affidavit as permitted. The order was issued on 6th November, and judgment was signed on the same day. The time for appearance had elapsed, and the defendant had not asked for a stay of proceedings.

W. E. Middleton, for defendant.

G. H. Kilmer, for plaintiffs.

THE MASTER.—I have always understood that a notice of motion operated as a stay in a case such as the present until finally disposed of: *Archibald*, 14th ed., p. 1406; *Wood v. Nicholls*, 4 P. R. 111; *Dean v. Thompson*, ib. 301; *Farden v. Richter*, 23 Q. B. D. 124. . . . I base my judgment on

the ground that the rule, as evidenced by the general understanding and practice of the profession, is that in a case like the present there is a stay of proceedings, which is a desirable and convenient practice, and that the entry of judgment was premature.

The judgment must be set aside with costs to defendant in any event.

CARTWRIGHT, MASTER.

NOVEMBER 18TH, 1903.

CHAMBERS.

RE STRATHY WIRE FENCE CO.

Appeal Bond—Form—Irregularity—Obligees — Motion to Set aside—Costs.

Motion by the company and the assignee thereof for the benefit of creditors to set aside an appeal bond filed by the petitioner for a winding-up order on a proposed appeal from the decision of TEETZEL, J., ante 834, refusing the petition.

Grayson Smith, for applicants.

W. J. O'Neail, for petitioner.

THE MASTER.—The grounds of objection are:—1st. That the words "held and firmly" are omitted before the word "bound." I do not give effect to this. Rule 830 (1) says that "the security shall be by bond which may be according to Form 197." I think this is a substantial compliance with the form.

2nd. That the bond says "each of us by himself," instead of "binds" himself. It is said in answer that Form 197 says "by." No doubt this is a misprint continued from the form given in the Rules of 1888 (Form No. 209), and also in the Rules of the Court of Appeal issued 30th March, 1878 (Form A.). The same expression is found in Cassels's Practice of the Supreme Court, as pointed out by Osler, J.A., in *Jamieson v. London and Canadian L. and A. Co.*, 18 P. R. 413, and *Young v. Tucker*, ib. 449. In the latter case the bond was on this ground alone disallowed. But here the very form given by the Rules is in this respect followed. The bond cannot, therefore, be set aside for this reason. It was contended that, inasmuch as the exact words of Form 197 had not been used, effect should be given to the objection. But I do not think there is any force in the contention.

3rd. It was argued that the assignee for benefit of creditors of the company should be made an obligee. But there is no evidence on this motion as to there being any assignee. All that I have is an unverified copy of what purports to be an order made on 10th October, in which it is recited that it was made "in presence of counsel for the said company and the assignee for the benefit of creditors thereof."

I think, therefore, that the motion fails on all grounds. But I dismiss it with costs to be costs in the appeal, because the bond itself is not wholly free from criticism. It is to be wished that the obvious misprint in Form 197 may be speedily corrected.

MEREDITH, C.J.

NOVEMBER 19TH, 1903.

WEEKLY COURT.

CANADA FOUNDRY CO. v. EMMETT.

Contempt of Court—Inciting Breach of Injunction—Motion to Commit—No Breach Shewn.

Motion by defendants to commit George Fisher, Frank Hodapp, and James Ford, three employees of plaintiffs, for inciting a breach of an injunction obtained by plaintiffs against defendants on 5th September, 1903, restraining interference with plaintiffs' workmen. The plaintiffs (it was stated) sent Fisher and Hodapp to a hotel in the neighbourhood of plaintiffs' premises, to see what the defendants would do with them. Fisher and Hodapp represented to Atkinson and Elliott, two of the defendants, that they had left the plaintiffs' employment, and wanted to leave town. Atkinson and Elliott gave them tickets and money to enable them to leave the city. A motion was pending for the committal of the two defendants named for this breach of the injunction, and the present motion was to commit Fisher and Hodapp and Ford for inciting the breach.

J. G. O'Donoghue, for defendants, cited *Seaward v. Patterson*, [1897] 1 Ch. 545, and *Vanzandt v. Argentine*, 2 McCrary's Rep. 642.

G. H. Watson, K.C., for Fisher, Hodapp, and Ford, contra.

MEREDITH, C.J.—The Court will not permit anyone to commit a breach or to aid in the commission of a breach of the injunction. It is not an unfair result from that, that the Court would prevent anybody from inciting another to commit a breach of the injunction, if such case were made out.

There is nothing upon the material here to shew an inciting to commit a breach of the injunction. The injunction did not restrain any of the defendants from doing what, as I understand it, it is said Atkinson and Elliott did in this case, which was simply that two men who had been in the employment of the plaintiffs, came to them, one saying that he had quarrelled with the company, and left their employment, the other, that he was desirous of leaving, but had not the means of getting out of town, as they expressed the wish to do. There was nothing, as I understand, in the injunction to prevent the defendants doing that. What they are restrained from doing is inciting any employee of the company to leave their service. Here one of them was not in the employment of the company, and the other was himself applying, as I have said, to Atkinson and Elliott for assistance, upon the statement that he was desirous of leaving. It seems plain that no breach of the injunction has taken place, and it therefore follows that the effort of Fisher and Hodapp to incite them was no contempt of Court. I don't see that it makes any difference at all that the statement of Fisher and Hodapp, the one that he had left and the other that he was desirous of doing so, was untrue, and that they were mere spies in the camp of the enemy. The question is: Is the thing that they induced Atkinson and Elliott to do a breach of the injunction? I think not. I think the motion fails and should be dismissed with costs.

OSLER, J.A.

NOVEMBER 21ST, 1903.

CHAMBERS.

RE WILSON.

Bankruptcy and Insolvency—Assignments and Preferences Act—Motion to Remove Assignee for Creditors—Grounds not Specified in Notice of Motion—No Evidence to Support Motion—Proposed Examination of Assignee—Judicature Rules not Applicable.

Motion by creditors for an order removing the assignee for the benefit of creditors of George Wilson & Co., insolvents, and appointing another or an additional assignee, and upon motion by the same applicants to commit the assignee for refusal to attend for examination upon the pending motion to remove him.

The motion was heard by OSLER, J.A., sitting for a Judge of the High Court.

A. C. McMaster, for applicants.

D. L. McCarthy, for the assignee.

OSLER, J.A.—Section 8 (1) of the Assignments and Preferences Act, R. S. O. ch. 147, provides that “an assignee may be removed, and another substituted, or an additional assignee appointed, by a Judge of the High Court, or of the County Court where the assignment is registered.” The method of procedure under this clause is not prescribed by the Act, as it is in matters arising under secs. 34-39, nor is any provision made as to how the evidence is to be taken, whether *viva voce* or by affidavit. The notice of the original motion stated that in support of it would be read the examination of the assignee intended to be taken and the affidavit of one Le Vallée. No affidavit was filed or produced, and the examination of the assignee has not been taken. It appears that an appointment to examine him before the local officer at St. Catharines under Rule 491 was taken out and served upon him, but that he refused to attend, on the ground that Con. Rule 491 did not apply to a proceeding of this nature, which is not in Court, and in which the Judge acts simply as *persona designata*. The notice of motion stated no ground for the removal of the assignee.

In my opinion, in such a proceeding as this the assignee is entitled to know what is alleged against him as disqualification or other ground of removal, and, however briefly and compendiously, it should be expressly stated in the notice. The motion ought not to be launched in the bold fashion here adopted, in the hope of fishing out of the assignee's examination something or other to support it.

The motion to remove should be dismissed because no reason is stated in the notice why the assignee ought to be removed, and because there are no materials of any kind before the Judge to supply the omission.

The motion to commit must also be dismissed. There is nothing in the Assignments and Preferences Act or the Judicature Act or Rules which enables a Judge to apply to the principal proceeding the procedure applicable in an action. *Re Young*, 14 P. R. 303, referred to. That has been expressly done to a limited extent in matters arising under secs. 34, 37, and 39, but this only emphasizes the omission in the case of a proceeding under sec. 8 (1). The assignee is not obliged to attend upon the appointment of an officer who had no authority to issue it.

Motions dismissed with costs.

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BRITTON, J.

NOVEMBER 21ST, 1903.

WEEKLY COURT.

RE WALTON AND NICHOLS.

Will—Construction—Devise—Intention—Supplying Words to Carry out—Estate—Fee Simple or Estate Tail.

Petition by Charles E. Walton under the Vendors and Purchasers Act upon a question of the title of the petitioner to certain land under the will of Charles Walton. The testator by his will divided his farm into two parcels: (1) the south 15 acres with all the buildings; (2) the residue of the farm. The first part he devised to his wife for life or during widowhood, and then to his adopted son, the petitioner. No question arose as to this part. The residue of his farm he gave to his wife until the adopted son should arrive at the age of 21, unless the wife should marry before that date. Then, in the 5th paragraph of the will, the testator provided for the event of the death of the petitioner before attaining the age of 21, and without leaving issue of his body, or after arriving at the age of 21 without leaving issue of his body, in which event there was a gift to Charles Ewings and Wellington Ewings. In the 6th paragraph the testator created a charge in favour of his wife, from the time of the adopted son attaining the age of 21, or from the time the adopted son, had he lived, would have attained that age, of a rent of £15 a year.

H. J. Scott, K.C., for petitioner.

W. E. Middleton, for the purchaser.

BRITTON, J., held that the will must be read as if it contained the words "or dying after arriving at such age and during the lifetime of my wife." The testator did not intend that Charles Ewings and Wellington Ewings should get the

property unless the petitioner died before the widow and without lawful issue. The testator intended that the petitioner should, if living, take an estate either in fee simple under a devise to him and his heirs, or an estate in tail under a devise to him and the heirs of his body. In either case the petitioner can make a good title. *May v. Logie*, 23 A. R. 785, followed.

Order declaring accordingly. No costs.

NOVEMBER 21ST, 1903.

DIVISIONAL COURT.

DUNN v. MALONE.

Interest—Rate of—Chattel Mortgage—Interest Act. R. S. C. ch. 8—Express Waiver of Provisions of, not Binding on Mortgagor.

Appeal by defendant from judgment of Judge of County Court of Wentworth in favour of plaintiffs in an action for redemption of a chattel mortgage. On the 6th April, 1901, plaintiffs made a chattel mortgage on their household furniture to one Samuel Bell, of the city of Hamilton, to secure payment of \$125 advanced to them. The interest was to be \$5 a month, and the mortgagors waived the benefit of R. S. C. ch. 8, the Interest Act, and the amending Act of 1900, and declared that the statement in the mortgage of the rate of interest was a compliance with the Acts. The plaintiffs made 12 monthly payments of \$5 each and two payments of \$10 each, in all \$80, on account of interest, between 6th April, 1901, when the advance was made, and 6th August, 1902, when the last of these payments was made, and 9 monthly payments of \$5 each on account of principal. On 29th December, 1901, they tendered the mortgagee \$30 as being enough to satisfy the balance. This was refused, the mortgagee claiming \$80 for principal and \$20 for interest. The mortgage was assigned to defendant in December, 1902. On 10th January, 1903, plaintiffs brought this action and offered to pay the \$30 which they had tendered. The Judge found that no more than the \$30 was due and ordered defendant to pay plaintiffs' costs, the \$30 to be set off against them.

W. S. McBrayne, Hamilton, and M. Malone, Hamilton, for appellant.

K. Martin, Hamilton, for plaintiffs.

THE COURT (STREET, J., BRITTON, J.) held that the Interest Act was passed in the public interest for the protec-

tion of persons borrowing money upon personal security. The policy of the law is to allow the borrower and the lender to agree upon any rate of interest, and the borrower having agreed to it must pay it, provided the rate per annum is stated in the contract. This proviso is his only protection, and it is introduced to prevent his being kept in the dark by the lender as to the real rate of interest per annum which he is agreeing to pay. To allow a borrower, when making his contract, to agree that the Act should not apply, would be to allow two private individuals to set at naught an Act passed in the public interest. If these clauses of waiver were held to be valid, they would become a common form, and the Act would speedily become a dead letter. There is a singular lack of authority in English and Canadian reports. *Mabee v. Crozier*, 22 Hun (N.Y.) 264, *Bosler v. Rheem*, 72 Pa. St. 54, *Am. & Eng. Encyc. of Law*, 1st ed., vol. 28, pp. 533-4, and *Graham v. Ingleby*, 1 Ex. 651, referred to.

Appeal dismissed with costs.

NOVEMBER 21ST, 1903.

DIVISIONAL COURT.

TRAVISS v. HALES.

*Husband and Wife—Liability of Husband for Torts of Wife
—Marriage before 1884.*

Appeal by defendant Richard Hales from judgment of STREET, J., ante 309, in favour of plaintiff for \$1 and costs against both defendants in an action against husband and wife to recover damages for a slander uttered by the wife in April, 1901. The defendants were married in 1875. Street, J., held upon conflicting authorities that the marriage being before the Act of 1884, the husband was liable for the torts of his wife.

F. A. McDiarmid, Lindsay, for appellant.

J. W. McCullough, for plaintiff.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) referred to *Amer v. Rogers*, 31 C. P. 95, an article by Mr. T. Cyprian Williams in 16 *Law Quarterly Review*, p. 191, *Lush on Husband and Wife*, 1st ed., p. 256, 2nd ed., pp. 290, 291, upon the one hand; and to *Lee v. Hopkins*, 20 O. R. 566, *Seroka v. Kattenburg*, 17 Q. B. D. 177, and *Earle v. Kingscote*, [1900] 2 Ch. 585, on the other; and decided to follow the decision of the Court of Appeal in

the last case, not being able to discover any such difference between the English statutes and our own as to justify the opposite conclusion. The ground upon which the English cases proceeded was that the right conferred of suing the wife alone in respect of torts committed by her during coverture was an additional right given to the person wronged, and that there was nothing in their Acts to take away from him his common law right of suing the husband and wife jointly, and there is nothing in our Acts before 47 Vict. ch. 19 to enable the Court to say that the common law right is taken away, if upon the provisions of the English Acts it was not.

Appeal dismissed with costs.

BRITTON, J.

NOVEMBER 23RD, 1903.

WEEKLY COURT.

GURNEY FOUNDRY CO. v. EMMETT.

Evidence—Cross-Examination of Deponent on Affidavit—Motion for Injunction — Production of Documents on Examination—Undertaking to Produce—Answers to Questions—Relevancy of Questions—Sufficiency of Answers—Trade Union—Details as to Employer's Business.

Motion by defendants for an order to commit W. C. Gurney to gaol for contempt in not producing on his examination on his affidavit certain books, letters, and documents, and for refusal to answer certain questions, or for an order for production and attendance at his own expense for further examination, etc.

J. G. O'Donoghue, for defendants.

E. E. A. DuVernet, for plaintiffs.

BRITTON, J.—On 28th August, 1903, W. C. Gurney, who is the second vice-president of the plaintiff company, made an affidavit which was for the purpose of, and was part of the material used on, an application for an injunction herein.

On the 20th October Gurney was examined at great length upon this affidavit, and it is in reference to the refusal to produce papers, and to answer questions on that examination, that this application is made. . .

On the 9th November the Chancellor made an order (ante 959) restraining the defendants from issuing and publishing the placards, posters, and printed matter complained of, or any like productions, till the trial or further order.

To that extent the proceeding for which the affidavit was filed, has been disposed of, and so to the extent to which the restraining order has been made the right of cross-examination is gone; see *Holmsted and Langton*, 672; Rule 490.

As to production, the defendants did not follow the course suggested in *Lavery v. Wolfe*, 10 P. R. 488, and on that ground I should be warranted in dismissing the motion, so far at least as it relates to non-production.

I propose, however, to consider the matter on its merits.

The motion is to commit for contempt:—

(1) In not producing before the special examiner the books, etc., referred to at questions 255, 256, 261, 334, 335, 336, and 337, and also other books, documents, etc., referred to in the said examination;

(2) For refusal to answer questions Nos. 198 to 201, 452 to 456, 510 to 513, 585, 620, 654, 657, 699 to 707, and 716 to 719, all inclusive; and

(3) For refusal to attend for the conclusion of his examination.

Or in the alternative for an order to Gurney to produce and to attend at his own expense and answer the questions above referred to and be further questioned.

It is very material in considering this matter to note that the examination is not for discovery. The cross-examination on an affidavit ought to be confined within reasonable limits. The defendants will no doubt avail themselves of their right to an order for production and of examination of an officer of the company for discovery. The production asked for, as indicated by these questions, is of the following:

(a) A copy of the indenture between the plaintiff company and apprentices. The subject of indenture was introduced by question 217:—

“Do you have indentures for your apprentices?” Answer: “Yes.”

From questions 217 to 261, the answers to all are full and frank, with nothing that would suggest any attempt or desire, on Gurney's part, to evade the question or frame an answer so as to avoid giving all the information in his power.

Q. 252.—“Do you state that the indenture makes provision for letting the apprentice off if he is guilty of any of these things?” A.—“Yes. I think so, if I am not mistaken.”

Q. 253.—“Have you a copy of that indenture?” A.—“Not with me.”

Q. 254.—“Can you get me a copy of that indenture?”
A.—“Yes.”

Q. 255.—“And will you?”

That question was not answered, but Mr. DuVernet said, “I will supply you with a copy of that indenture.”

Mr. O'Donoghue did not reply to Mr. DuVernet, but continued:

Q. 256.—“Now, are you quite positive there is that provision in the indenture?” A.—“I remember it so. I would not exactly swear to the fact that it is there.”

Mr. O'Donoghue to Mr. DuVernet:—“Will you consent to one of these going in as an exhibit?”

Mr. DuVernet: “Certainly.”

Mr. O'Donoghue proceeds.

Q. 257.—“How do your apprentices work—on piece work—or how?” A.—“They start on day work—they could not make a living at piece work.”

Q. 258.—“But you can switch them from day work to piece work and back again if you see fit?” A.—“Yes.”

Q. 259.—“And if they make too much at piece work you can put them on day work?” A.—“We desire them to make as much as they can; it is for the good of the company.”

Q. 260.—“How much per cent. do you keep off them when they work piece work?” A.—“It will be stated in the indenture. I forget. It varies for different work.”

Q. 261.—“The indenture is in blank?” A.—“I will get one that is filled in properly.”

There is no allegation that either Mr. Gurney or Mr. DuVernet refused to produce this indenture or an indenture filled up, or that the defendants, or any of them, in any way are or can be prejudiced by its non-production, and further, what appears to be a printed form of such indenture is in a copy of a paper called “The Toiler,” produced by Mr. Gurney as exhibit H, referred to in his affidavit. It may fairly be assumed that this is a true copy of the printed form of indenture used by plaintiff company.

The next thing that defendants desire to have produced is a letter within to Mr. Gompers, president of the American Federation of Labour, Washington, D.C., dated 22nd March, 1902.

Mr. O'Donoghue apparently had such a letter, or what purported to be a copy of such a letter, and he read it to Gurney and asked:

Q. 325.—“Now, did you write a letter on 22nd March, 1902, to Mr. Samuel Gompers to this effect?” (reads the letter). A.—“I did not send that letter.”

Q. 326.—“Do you know anything about the letter?” A.—“I know there was some correspondence with Gompers.”

Q. 327.—“From whom in your establishment?” A.—“I could not say; one of the officers. I know it was not me.”

Q. 328.—“Mr. Carrick?” A.—“Possibly.”

Q. 329.—“Would it be Mr. Edward Gurney?” A.—“Possibly.”

Q. 330.—“Is that statement that they were discharged correct or incorrect?” A.—“It is not correct according to my information.”

Q. 331.—“Whoever wrote that would know, I suppose?” A.—“He would believe he was writing what was correct, no doubt.”

Q. 332.—“The chances are you would be wrong?” A.—“No, the chances are I am right, I think.”

Q. 333.—“Although you do not know anything about the dispute further than was reported to you?” A.—“That is right.”

Q. 334.—“Do you doubt that that letter was sent?” A.—“I know that there was some correspondence with Gompers.”

Q. 335.—“Would the letters from Gompers and copies of your letters in reply be in possession of the company?” A.—“I think so.”

Q. 336.—“Could you get them?” A.—“I could.”

Q. 337.—“I would like to have these letters—will you produce them?”

Mr. DuVernet said: “I will produce them if they are in existence.” The matter then dropped.

With that undertaking on the part of the solicitor, and with all the information in possession of defendants' examining counsel, and considering that this is, as before stated, an examination upon an affidavit and not for discovery, and assuming for the sake of argument that defendants at the trial may be entitled to those letters, and that they are relevant to the issues therein, it is going altogether afield to talk of “contempt” on the part of the witness, or to ask for any order for production for further examination on this affidavit.

As to refusal to answer. Speaking generally, the defendants have not adopted the method prescribed by Rule 455. In a case of this kind, where a witness is not contumacious, and where the objection is taken to the question by counsel,

or by the witness at the instance of or upon the advice of counsel, it is not a case of contempt or of committing for refusal. The validity of the objection should be determined by the Court or a Judge, and Rule 492 makes the cross-examination upon an affidavit subject to the same rules as apply to the examination of a party for discovery—so Rule 455 applies.

The notice of motion is as to Gurney's refusal to answer questions numbers 198 to 201. The questioning had been in regard to apprentices and journeymen in other shops, and then

Q. 196.—“The other establishments, in business, manage to get along with that?” A.—“No, they are always very short of help.”

Q. 197.—“Have they ever complained to you?” A.—“Bitterly.”

Q. 198.—“Who have?”

Mr. DuVernet objected.

Mr. Gurney: “I do not wish to bring my friends under the ban of the union.”

Mr. DuVernet: “That has nothing to do with it. I would like the examination confined to some reasonable limits.”

Mr. O'Donoghue: “The witness has sworn here that they require a large number of apprentices.”

Mr. DuVernet: “I decline to allow the examination to proceed on that line, on the ground that it does not come under the affidavit and is not relevant.”

Ruling of special examiner:

“I admit the question subject to the objection. I think the question is within the affidavit, arising as it does out of previous answers of the witness.”

Q. 198.—“You refuse, then, to say who it was made the bitter complaints to you?” A.—“Yes.”

Q. 199.—“You recollect who made the complaints?” A.—“Perfectly.”

Q.—“Recently?” A.—“Recently.”

Q. 201.—“Since this suit was started?”

Mr. DuVernet: “I object to the question.”

I am of opinion that the objections to these questions were quite proper. It seems to me entirely immaterial that other establishments were short of help, and that persons in other establishments complained to witness; and the witness was quite right in refusing to give the names of persons so complaining.

Questions 452 to 456, 510 to 513, 585, 620, 654, 673, 699 to 707, 724 to 729, inclusive.

In regard to these, the defendants are not entitled to succeed on their motion.

In some cases the refusal to answer was because the names wanted were of persons who may be witnesses called by plaintiffs if this case goes to trial. It may be that a party to a suit is entitled to names and addresses of persons in certain cases, notwithstanding the fact that they may be called on behalf of the opposite party—but in this case the persons who may be witnesses do not form any substantial part of the material facts—and their names need not be disclosed. This is in line with the decisions of *Marriott v. Chamberlain*, 12 Q. B. D. 154, and *Humphries v. Taylor*, 39 Ch. D. 693.

Some of these questions are entirely irrelevant.

And as to some, the witness had, by his answers to other questions, given all the information in his power. There is, in point of fact, no such refusal to answer, as would in any way prejudice the defendants.

After a cross-examination of the witness in which 737 questions were put by the examining counsel, covering, as I think, the whole ground, and getting all information of value, it would, in my opinion, be improper to order a further attendance for further examination on this affidavit.

Motion dismissed with costs.

BRITTON, J.

NOVEMBER 24TH, 1903.

TRIAL.

BONTER v. NESBITT.

Settlement of Action—Dispute as to—Trial of Question—Finding of True Settlement—Costs—Solicitor's Lien—Acquiescence.

Action for malicious prosecution and arrest, and counter-claim for amount of several judgments against plaintiff. The action was entered for trial at the spring jury sittings, 1903, at Cobourg. The parties met during the sittings, and, in the absence of counsel or solicitors, arrived at a settlement. Upon an appeal by plaintiff and his solicitor from an order of a local Judge dismissing appellants' motion for an order upon defendant to pay the costs incurred by plaintiff in the action, MACMAHON, J., ordered (ante 610) that plaintiff should be at liberty to continue the action for the recovery of costs, and the action went to trial again under this order. The defendant pleaded the settlement and release, and plaintiff replied setting up as the true settlement

that defendant agreed to pay plaintiff \$405 in cash and all claims against plaintiff, and pay plaintiff's costs, and further that the settlement was fraudulent and collusive, and void as against plaintiff and as against the lien of the solicitor for his costs.

R. C. Clute, K.C., and J. W. Gordon, Brighton, for plaintiff.

E. C. S. Huycke, K.C., for defendant.

BRITTON, J., held the defendant's statement of what the settlement really was, namely, that defendant was to pay \$400 to plaintiff, to release all claims he had against plaintiff, and plaintiff was to release all claims he had against defendant, and the action and counterclaim were both to be dismissed without costs, should be accepted; the solicitor had lost his lien by acquiescence; and that there was no collusion.

Action dismissed without costs and counterclaim dismissed without costs.

TRIAL.

MACMAHON, J.

NOVEMBER 25TH, 1903.

CHANDLER AND MASSEY Co. v. GRAND TRUNK
R. W. Co.

Railway—Carriage of Goods—Arrival at Destination—Destruction by Fire in Railway Company's Warehouse—Liability—Conditions of Shipping Bill.

Action to recover the value of a static machine, an X-ray apparatus, and a water motor shipped by the plaintiffs to one Kerr, at Dunnville, on the 7th November, 1902, and destroyed by fire while in defendants' freight shed at Dunnville.

E. B. Ryckman, for plaintiffs.

H. S. Osler, K.C., for defendants.

MACMAHON, J., held that it was impossible, on the evidence, to say that the defendants were guilty of any negligence in connexion with the burning of the freight shed; that the goods, when destroyed, were in possession of defendants as warehousemen; and that, by virtue of the 10th condition indorsed on the shipping bill, after the goods were placed in the warehouse, the defendants' liability was at an end. *Richardson v. Canadian Pacific R. W. Co.*, 19 O. R.

369, and Lake Erie and Detroit River R. W. Co. v. Sales, 26 S. C. R. 665, referred to.
Action dismissed.

MACMAHON, J.

NOVEMBER 25TH, 1903.

TRIAL.

YELLAND v. IRWIN.

Contract—Action to Set aside—Misrepresentations—Purchase of Interest in Timber Limits—Costs—Parties.

Action by Eliza Yelland, widow of the late Dr. Yelland, of Peterborough, and W. G. Yelland, brother of the deceased, the executors of his will, to set aside an option given by plaintiffs to defendants Stratton and Hall for the purchase by the latter of the plaintiff's interest as executors in certain timber limits, and for payment by defendant William Irwin to plaintiffs of \$2,211 now in his hands, being the share of plaintiffs as executors in the proceeds of the sale of the limits. The defendants Stratton and Hall by their defence claimed specific performance of the option. The executors' interest was one-twentieth, and the price agreed upon was \$1,275.

D. W. Dumble, K.C., for plaintiffs.

W. R. Riddell, K.C., and W. F. Johnston, Peterborough, for defendants Stratton and Hall.

L. M. Hayes, Peterborough, for defendant Irwin.

H. W. Hall, Peterborough, for infant defendant.

MACMAHON, J., without imputing to defendant Hall any desire to misstate what took place between himself and plaintiff Eliza Yelland, concluded that the former had forgotten some of the statements he made, and accepted the account given by the latter of the interview between them, and held that, by reason of the statements made, the option or agreement could not stand. *Walters v. Morgan*, 3 De G. F. and J. at p. 723, *Waters v. Donnelly*, 9 O. R. at p. 401, and *Margraf v. Muir*, 57 N.Y. 155, referred to.

Judgment for plaintiffs declaring that the agreement or option is null and void and should be delivered up to be cancelled, and directing defendant Irwin to pay to plaintiffs \$2,211 in his hands, being one-twentieth of the amount for which the limits were sold. Defendants Stratton and

Hall to pay plaintiffs' costs and costs of defendant Irwin. Plaintiffs to pay the costs of the infant defendant, who was not a proper party.

CARTWRIGHT, MASTER.

NOVEMBER 26TH, 1903.

NOXON CO. v. COX.

*Venue—Motion to Change—County Court Action—Contract—
Clause Governing Venue—Construction—Enforcement.*

Motion by defendant to change venue from Woodstock to Goderich and to transfer the action from the County Court of Oxford to the County Court of Huron.

W. Proudfoot, K.C., for defendant.

C. A. Moss, for plaintiffs.

THE MASTER.—The action is on an agreement to pay a note of \$125 and give an old machine as the price of a new one. The contract states that on default in payment "suit therefor may be entered, tried, and finally disposed of in the Court where the head office of the Noxon Company (Limited) is located." (That is, in Ingersoll, County of Oxford.) . . . It was argued that the words quoted are only applicable to a Division Court. . . . I do not think they are to be so restricted. It seems to me more reasonable to hold that the word "Court" is to be understood as meaning "the Court having jurisdiction" (see 3 Edw. VII. ch. 13, sec. 1 (O.)), and to be construed in reference to the contract in which they occur. . . . The parties agree that in case of litigation it shall be carried on in the Court (whatever it is, whether High Court, County Court, or Division Court) having jurisdiction over the subject matter of the action in the locality where the head office of the company is situated.

I refuse the motion on this ground, and give no opinion on the merits.

The plaintiffs are willing to let any extra expense of trial at Woodstock be to defendant in any event. This term will be embodied in the order.

Costs in the cause.

CARTWRIGHT, MASTER.

NOVEMBER 26TH, 1903.

CHAMBERS.

FITZGERALD v. WALLACE.

Security for Costs—Appeal to Court of Appeal—Application for Increased Security—Forum.

Motion by adult defendants for increased security for costs.

D. W. Saunders, for applicants.

F. W. Harcourt, for infant defendants.

H. E. Rose, for plaintiff.

THE MASTER.—The action was dismissed without costs. The plaintiff has appealed to the Court of Appeal. The case has been set down, and \$200 paid into Court as security.

Mr. Rose objected that the motion could only be made to the Court of Appeal or a Judge thereof. I think this objection is entitled to prevail. Rule 830 (8) was relied on for the motion. But it seems clear that all the provisions of that Rule are to be governed by the first line, which says "where security is required under Rule 826 or 827." Now, both of those Rules confer jurisdiction only on the Judges of the Court of Appeal.

No such application, so far as I am aware, has ever been made, otherwise than as was done in *Centaur Cycle Co. v. Hill*, 4 O. L. R. 493, 1 O. W. R. 639. . . .

Motion dismissed with costs to plaintiff in any event.

This will not prejudice the renewal of the application, as was done in *Centaur Cycle Co. v. Hill*.

CARTWRIGHT, MASTER.

NOVEMBER 26TH, 1903.

CHAMBERS.

FLYNN v. TORONTO INDUSTRIAL EXHIBITION ASSOCIATION.

Pleading—Action for Personal Injuries—Negligence—Defective Construction of Machine — Defence that Defendants Insured against Accident—Irrelevancy—Striking out.

The statement of claim alleged that the infant plaintiff was injured at the Dominion exhibition in September, 1903, while riding "in a machine known as a Razzle-Dazzle." The injury was alleged to have been the result of improper and defective construction of the machine. The 8th paragraph

alleged that defendants knew that the machine was dangerous.

The defendants moved to strike out the 9th paragraph, which repeated that allegation of the 8th, and concluded with an allegation that the defendants, to protect themselves against liability, insured themselves against the risk they so took in the Ontario Accident Insurance Company, which company were defending this action in the name of the defendants.

G. L. Smith, for defendants.

W. N. Ferguson, for plaintiff.

THE MASTER.—The motion must prevail, and the objectionable paragraph be stricken out. The only object it can have is to prejudice the jury on the trial of the case. Whether the defendants have so protected themselves from possible liability or not, is not in any way relevant to the issue. The fact cannot assist the plaintiff. It certainly should not be allowed to embarrass the defendants. The fact of such insurance could not, in my opinion, be given in evidence. But if the statement were allowed to remain on the record, it might be recited to the jury, and a discussion would ensue in which the fact of such insurance would be made known, to the manifest prejudice of the defendants. . . .

I base my decision on the ground that the fact, if true, is not "one of the material facts upon which the party pleading relies:" see Rule 268. At most, if admissible at all, it would only be evidence to support the allegation of knowledge of the defective condition of the machine by the defendants. But I do not think it is admissible, much less proper to be pleaded.

Order made striking out paragraph 9, with costs to defendants in any event.

BRITTON, J.

NOVEMBER 26TH, 1903.

TRIAL.

McCONACHIE v. GALBRAITH.

Water and Watercourses—Surface Water—Diversion to Neighbouring Land—Trespass—Specific Act—Damages—Injunction—Costs.

Action for damages for injury to land from surface water and noxious weeds, alleged to have been carried from defendant's to plaintiff's land.

Trial without a jury at Cobourg.

D. B. Simpson, K.C., for plaintiff.

G. H. Watson, K.C., and H. F. Hunter, Bowmanville, for defendant.

BRITTON, J.—Plaintiff and defendant are the owners of adjoining farms. Plaintiff says that the surface water flowing over defendant's land, if left to itself, would flow southerly over defendant's own land to a natural watercourse and on to Lake Ontario, and complains that defendant has obstructed the water in its natural course and so diverted it that it flows upon plaintiff's land to her damage.

This is a case in reference to surface water. No water-course has been established within the decision in *Beer v. Stroud*, 19 O. R. 10. The water does not flow in such a channel as to create riparian rights, within the ordinary acceptance of these words.

The evidence does not shew any collection of water by defendant at the point marked A. on plaintiff's plan. The natural flow of the surface water from points north and north-westerly of point A. is south and south-easterly to point A., and then on to B. and C., then crossing to plaintiff's land. . . . This is established by the weight of evidence of persons knowing the locality and by the measurements made on the ground. . . . It is established that for years prior to 1898 the bulk of the water left defendant's land at point C. and followed the course indicated by the dotted line to the east and south. This was surface water, and, according to *Ostrom v. Sills*, 24 A. R. 526, plaintiff had a right to keep it off her land. She did not build any dam or erect any barriers against this water, but her fence was there, and at the bottom of the fence and against it dirt collected, silt accumulated, and grass grew, forming an obstruction, so that, year after year, less water proportionately flowed upon her land. That, however, continued to be the course of the larger part of the surface water in spring freshets until 1898. In 1897 defendant had his land to the south of point C. "seeded down," and in the spring of 1898, owing to a bank of snow and ice against the line fence from B. to C., the water forced its way south on defendant's land, making a small channel for itself through defendant's seeded field. In 1899 the water again went that way, making this channel deeper, or making what defendant calls a "big ditch." Some water went that way in the spring of 1900. In the autumn of 1900 defendant ploughed his south field, and so obliterated the "big ditch." In the spring of 1901 defendant drew a load of manure and put it upon the land just below point C. to prevent the water going south, and he put some earth upon

the manure, making what plaintiff calls a dam. He also ploughed a furrow running westerly from point C. This was the beginning of the trouble. . . . In the autumn of 1902 defendant did further work on the ground. . . . He put straw to fill up what he calls "the hollow," and he filled up a couple of furrows. He made a ditch from a point on his own land to the line fence between his land and plaintiff's. He cut a rail out of the line fence, dug the ditch under the fence, and took out the bottom rail. . . . He cut through a grass covered bank at the bottom of the fence. . . . making a ditch, as he admits, of 6 inches deep, and he then went upon plaintiff's land and continued the ditch upon her land to a furrow, a distance of about 3½ feet.

Defendant had no right to dig through this bank and go upon plaintiff's land. Plaintiff was and is entitled to the natural protection which is furnished as against surface water by the deposit upon her own land of silt and earth carried down by spring and autumn freshets.

No actual damage has been done to plaintiff's land by the water alone. All the damage proved is that from bringing down seeds of wild mustard, etc.

I think the \$25 paid into Court by defendant is sufficient to cover all damages.

Plaintiff is wrong in her contention that the surface water did not naturally flow upon her land. . . . The defendant had a right to do what he did as to ploughing and digging on his own land. It was only good husbandry. . . . Upon the evidence I conclude that no more water was by defendant caused to flow upon plaintiff's land than did flow in the years prior to 1898, except to the small extent of the digging done and trespass committed in the autumn of 1902.

As it is a case in which plaintiff is entitled to recover only as to a specific act, and as no further trespass is threatened, it is not a case for injunction.

Under the circumstances, I think the judgment should be without costs. . . .

The \$25 to be paid out to plaintiff in full of damages.

BRITTON, J.

NOVEMBER 26TH, 1903.

TRIAL.

GORDANIER v. JOHN DICK CO.

Master and Servant—Injury to Servant—Negligence—Defect in Machinery—Knowledge of Master—Knowledge of Servant—Contributory Negligence—Jury—Nonsuit.

Action for damages for loss of plaintiff's right hand by its being caught in the fans of a "dryer" in the bag factory of defendants, where plaintiff was employed.

In the dryer were two fans which, when in motion, revolved with great velocity. The dryer was a room about 16 feet long by 10 feet wide. The air in it was heated by steam in pipes within the room. The cloth to be dried was hung upon bars in the room and the room was closed up, not with doors on hinges, but with panels or boards fastened together like doors and placed in position to box in the material to be dried. On one side, in a recess or opening, were the two fans, set some inches back of the frame in which was the gear by which the fans were driven, and back of an oil cup which received the oil for lubricating the gear. The fans were put in motion by putting a belt upon the tight pulley or driving pulley of the shaft connected with the fans. When the fans were not in motion this belt ran upon a loose pulley. The plaintiff alleged that the arrangement for running the fans was defective, to the knowledge of defendants; that the belt was a little wider than the loose pulley, and was liable to extend to the tight pulley and start the fans, without anyone using the shifter, and that the shifter itself would not effectively do the work intended.

The plaintiff left work on Saturday 23rd May at noon. He said that in closing up he noticed the tendency of the belt to go upon the tight pulley, and he had to hold the belt upon the loose pulley until the machinery stopped.

On the morning of Tuesday 26th May, before 6.30, the plaintiff went to the factory to commence work. On arriving, he said, he looked and saw that the belt was properly upon the loose pulley, and then started for the dryer to oil up. When he started none of the machinery was in motion. He took off one door or panel of the drying room. He said he was ordered to do this, and told that it was not necessary to open another. He first went into the north part and filled the oil cup for the north fan. He then began to make his way through or between the folds of cloth with which the place was filled, and in going through heard the machin-

ery start. He held the oil can in his left hand, put his right hand up to feel for the oil cup, but, instead of reaching it, his hand went against the fan, which was then in motion, having been started, after the driving machinery was started, by the slipping of the belt from the loose pulley to the tight pulley.

The jurors visited the factory and had a view of the premises, and found, in answer to questions, that the injury was caused by negligence in having the arrangement of shifting lever and pulley so defective as to permit the belt to slip upon the tight pulley and start the fans when they ought not to be set in motion, and that plaintiff could not, by the exercise of reasonable care, have avoided the injury; and assessed his damages at \$1,250.

E. C. S. Huycke, K.C., for plaintiff.

R. C. Clute, K.C., for defendants, contended that upon plaintiff's own evidence he was guilty of such contributory negligence as to disentitle him to recover; that he went to the drying room in the dark, and felt for the oil cup, instead of taking off a door before going in, and in that way getting sufficient light to enable him to see the oil cup.

BRITTON, J.—. . . In my opinion, it was for the jury to say, considering all the circumstances—what plaintiff was told by the foreman as to the necessity for taking off more than one door, plaintiff's own knowledge of the place, he having for a long time been engaged at that work, his familiarity with the location of the oil, his not knowing that the fans were in motion—whether plaintiff was guilty of such negligence as to be himself to blame for this accident. The most I can do is to say that “facts have been established by evidence from which negligence may be reasonably inferred—the jurors have to say whether, from the facts submitted to them, negligence ought to be inferred.” I do not say that it ought to be inferred in this case.

It was argued that plaintiff, knowing that in starting the machinery the belt was likely to slip from the loose pulley to the tight one, should have remembered this when entering the drying room, and have assumed that the fans were in motion, and so have been careful not to place his hand even near the oil cup. It is easy to be wise after the event. Knowledge of defect or danger is not necessarily contributory negligence. A person may know, and under certain circumstances may be excused for forgetting at the particular moment. . . . I am of opinion that I could not properly

have withdrawn the case from the jury: see *Scriver v. Lowe*, 32 O. R. 290, and cases there cited.

Judgment for plaintiff for \$1,250 and costs.

NOVEMBER 26TH, 1903.

DIVISIONAL COURT.

McCORMACK v. GRAND TRUNK R. W. CO.

*Railway—Carriage of Goods—Escape of Dog in Transit—
Liability of Railway Company—Common Carriers.*

Appeal by defendants from judgment of senior Judge of County Court of Wentworth in favour of plaintiff for \$100 damages in an action for the loss of a field spaniel delivered to defendants by plaintiff to be carried from Hamilton to South River, in the district of Parry Sound, which, while in care of defendants' servants, escaped and was never recovered.

Plaintiff shipped a deer hound and the dog in question on the 1st November, 1902, for the carriage of which he paid 80 cents each, receiving from defendants a check for each dog. The dogs were put into the baggage car at Hamilton by the baggageman who had charge of them. Each had a collar. A chain was fastened to the collar of the hound by a snap, and the other end of the same chain was fastened to the spaniel's collar by a cross-bar to a ring on the collar. There was a ring in the middle of the chain for the use of the person leading or holding the dog. When the train reached Toronto, the baggageman removed the dogs from the car, and, taking the cross-bar from the ring on the spaniel's collar, put the chain through under the collar, bringing the heads of the two dogs together, and used the end of the chain to tie the dogs to a post at the overhead stairway in the Union Station, until the train for Parry Sound should be ready to leave. The baggageman was leading the dogs to the Parry Sound train, when the spaniel backed up and pulled his head through the collar and escaped and was not recovered.

The Judge found that the collar on the spaniel was sufficiently strong, and that the defendants, having for their convenience altered the way in which the dog was fastened, could not complain.

J. W. Nesbitt, K.C., for defendants, contended that they were not common carriers of dogs, and therefore not liable for the loss, citing *Dickson v. Great Northern R. W. Co.*, 18 Q. B. D. 176.

S. F. Washington, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C. J., MACMAHON, J.) was delivered by

MACMAHON, J. (after setting out the facts at length):—
By the English Railway and Canal Traffic Act, 17 & 18 Vict. ch. 31, sec. 1, the expression “traffic” includes “animals,” and it is the same in our Railway Act, 51 Vict. ch. 29, sec. 2 (v).

Section 2 of the English Act provides that the company shall afford all reasonable facilities for the receiving and forwarding and delivery of traffic. . . .

[Quotation from the judgment of Lord Esher, M.R., in *Dickson v. Great Northern R. W. Co.*, 18 Q. B. D. at p. 190.]

The Master of the Rolls points out that the condition sought to be imposed on the railway company for carrying the dog the loss of which occasioned the action, was unjust and unreasonable, and therefore void.

[Reference to sec. 246 of the Dominion Railway Act.]

As pointed out . . . in *Cobban v. Canadian Pacific R. W. Co.*, 23 A. R. at p. 119, the language of sec. 7 of the Imperial Act enables a company to make a special contract with just and reasonable conditions, while ours contains an absolute denial of power to escape from liability for negligence. . . .

[Reference to *Robertson v. Grand Trunk R. W. Co.*, 21 A. R. at p. 215.]

The defendants being by the Railway Act the common carriers of animals of all kinds, this dog was received by them as common carriers, and, as it was not delivered to plaintiff in accordance with the contract, the defendants are liable for the loss. . . .

In *The Queen v. Slade*, 21 Q. B. D. 433, it was held that a dog is “goods” within the meaning of 2 & 3 Vict. ch. 71, sec. 40. . . .

Appeal dismissed with costs.

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CARTWRIGHT, MASTER.

NOVEMBER 28TH, 1903

CHAMBERS.

CANADIAN GENERAL ELECTRIC CO. v. TAGONA
WATER AND LIGHT CO.

*Summary Judgment—Motion for—Defence—Liability of
Company for Indebtedness Exceeding Statutory Limit.*

Motion by plaintiffs for summary judgment under Rule
603 in an action for the price of goods sold and delivered.

E. G. Long, for plaintiffs.

J. W. Bain, for defendants.

THE MASTER.—The amount of the claim was admitted. The motion was resisted on the ground that the affidavit of defendants' general auditor shews that the indebtedness of defendants largely exceeds the limits prescribed by R.S.O. 1897 ch. 199, and that under secs. 11 and 40 the directors are personally liable, but not the company. Whether this contention is right, and whether sec. 11 gives an exclusive and not an alternative remedy, is a question fairly arguable: *Jacobs v. Booth*, 85 L. T. R. 262.

Motion refused. Costs in the cause.

CARTWRIGHT, MASTER.

NOVEMBER 28TH, 1903.

CHAMBERS.

HUNTER v. BOYD.

*Pleading—Statement of Claim—Amendment before New Trial
—Rule 312—“At any Time”—Special Damage.*

Motion by plaintiff for leave to amend the statement of claim by inserting a paragraph alleging special damage.

The action had been tried, but a new trial had been ordered (ante 724).

W. R. Wadsworth, for plaintiff.

W. R. Riddell, K.C., for defendant.

THE MASTER.—Having regard to the language of Rule 312, as explained in *Williams v. Leonard*, 16 P. R. 544, *Patterson v. Central Canada S. and L. Co.*, 17 P. R. 470, and *Chevalier v. Ross*, 3 O. L. R. 219, the plaintiff must be allowed to make such amendments as he may be advised and set up a claim founded on special damage. The words "at any time" in Rule 312 have never been limited except in such cases as *Johnston v. Consumers' Gas Co.*, 17 P. R. 294, and *Sales v. Lake Erie and Detroit River R. W. Co.*, 17 P. R. 224. It was expressly decided in *The Duke of Buccleuch*, [1892] P. 201, that even after a case had been to the House of Lords a new plaintiff might be substituted for one wrongly so made. The decision was based on this, that the words "at any stage" meant "so long as anything remains to be done." In the present case, if plaintiff can maintain his action, he is entitled to an opportunity of shewing any special damage he may have suffered. But defendant must be fully indemnified.

Order made as asked. Plaintiff to file and serve such amendments as he may be advised within a week. Defendant to have eight days within which to deliver such amended defence as he may be advised. Costs of this motion and all costs lost or incurred by reason of this order to defendant in any event.

MACLAREN, J. A.

NOVEMBER 28TH, 1903.

CHAMBERS.

RE *BOYD, BOYD v. BOYD*.

Will—Construction—Legacy—Deferred Payment of—Executor—Mortgage—Change of Circumstances.

Motion by plaintiffs for an order on defendant, executor of a joint will made by his father and mother, for an account, and for payment into Court of moneys to which plaintiffs are entitled. The testator and testatrix had, previous to making the will, sold their farm to defendant, and he gave them a mortgage back for \$2,000, with interest at five per cent. This sum was to be divided among the plaintiffs, grandchildren of the testator and testatrix. Defendant paid the interest to his mother until her death in 1886.

He sold the farm, and had since received the amount of the mortgage from the purchaser, and given a discharge. The will contained a provision that the bequests to plaintiffs should not be payable during the lifetime of defendant, "unless at his own option and free will, but shall become due and payable, with all additions of interest, when claimed after his death."

T. D. Delamere, K.C., for plaintiffs, contended that, on account of the altered circumstances, they were now entitled to their legacies.

J. H. McGhie, for Margaret Doan.

C. Swabey and F. A. Kerns, Burlington, for the executor.

MACLAREN, J.A. (sitting for a Judge of the High Court), held that the provision giving the executor the option of deferring payment of the legacies during his lifetime, was made in his ease as mortgagor, and this relation no longer existing, and he having now no interest in deferring the payment of the legacies, plaintiff had become entitled to them.

Order made directing a reference to the local Master at Milton to take the accounts and to fix the compensation of the executor. The moneys in his hands to be paid into Court at once. Further directions and costs reserved.

BOYD, C.

NOVEMBER 30TH, 1903.

CHAMBERS.

NOXON CO. v. COX.

Venue—Motion to Change—County Court Action—Contract—Clause Governing Venue—Construction—Enforcement.

Appeal by defendant from order of Master in Chambers (ante 1046), refusing to change the venue from Woodstock to Goderich and to transfer the action from the County Court of Oxford to the County Court of Huron.

A. A. Miller, for defendant.

C. A. Moss, for plaintiffs.

BOYD, C.—The contract sufficiently, though inaccurately, expresses that the venue shall be local in any action upon the contract at the option of the manufacturers. That is, it shall be tried in the locality where the head office of the company is situate, in the appropriate Court, if the company, as plaintiffs, so elect. The expression in the contract is

that the "suit may be entered, tried, and finally disposed of in the Court where the head office of the Noxon Company (Limited) is located." That is, of course, literally insensible; the head office is not in the Court, though it may be in the town and in the county in which the Court is held, whether Division or County Court.

I affirm the Master's order, but it will be right to express what is offered by the company, that the extra expense of trying at Woodstock, instead of Goderich, is to be borne by plaintiffs in any event.

Costs of appeal in the cause.

MACLENNAN, J. A.

NOVEMBER 30TH, 1903.

C.A.—CHAMBERS.

RE RAWDON VOTERS' LISTS.

Parliamentary Elections — Voters' Lists — Notice of Complaint — Mistake in — Amendment — Form — Sufficiency.

Reference under sec. 38 of the Ontario Voters' Lists Act upon a case stated by the Judge of the County Court of Hastings.

One Robert Totton, a duly qualified voter, filed with the clerk of the municipality six several notices of complaint, one in respect of voters in each of the several polling subdivisions of the township, for that purpose in each case using the form No. 6 prescribed by sec. 17 (1) of the Act.

In each of his notices the complainant made the mistake of placing in list No. 2 of the form, which was intended for cases of misnomer only, names which should have been placed in list No. 3, as being names which should, for various reasons, not have been inserted in the voters' list at all. It was conceded that all the names placed in list No. 2 were the true names of the persons, and there were no cases of misnomer. The ground of objection was stated opposite each name, most of them being by reason of non-residence, absence from the municipality or electoral division, or not being of age. There were a number of names properly placed in list No. 3, objected to on similar grounds to those specified in list No. 2.

The notice signed by the complainant referring to the several lists of names was "that the several persons whose names are mentioned in the first column of the subjoined list No. 2 are wrongly stated in the said voters' list as shewn in said list No. 2," and "that the several persons

whose names are set forth in the first column of the sub-joined list No. 3 are wrongfully inserted in the said voters' list as shewn in said list No. 3."

The printed heading of list No. 2 was: "List No. 2, shewing voters wrongly named in voters' list." And that of No. 3: "List No. 3, shewing persons wrongfully inserted in the voters' list."

It was objected before the County Court Judge that none of the names in list No. 2 could be removed from the list, inasmuch as there was no error in any of the names, and that the time for appealing having elapsed, no amendment of the notice could be allowed which would have the effect of disfranchisement. On the other hand, it was contended that the grounds of objection being specified in each case, the notice was sufficient, or at all events might be amended.

The questions referred were, whether the notice was sufficient to entitle the complainant to prove his objections, and if not, whether it might be amended.

R. A. Grant, for Robert Totton, the complainant.

F. Arnoldi, K.C., for certain voters, contra.

MACLENNAN, J. A.—By sec. 32 of the Act it is declared that "the Judge shall have power to amend any notice or other proceeding upon such terms as he may think proper."

It seems to have been contended before the learned Judge that, inasmuch as the effect of an amendment whereby the names in question or any of them should be struck off the voters' list, would be to disfranchise voters, it ought not to be allowed, for it would in effect be filing a new complaint after the time for complaining had elapsed. But it is to be observed that the inquiry before the Judge is not whether any voter is to be disfranchised, but whether certain persons are or are not entitled by law to vote, or to exercise the franchise. If persons not entitled to vote are left on the list, that is a most serious wrong done to all who are so entitled, and if the names of such persons are stricken off, they suffer no wrong.

There is, therefore, in my opinion, no ground on which a notice of objection, such as that in question, should not be amended by the Judge as freely as any other notice. Neither can it be an objection to an amendment that the time limited by the Act for serving notice of objection had elapsed, inasmuch as the matter cannot come before the Judge at all until after that time.

I am, therefore, of opinion that the learned Judge might have amended the notice, if he thought any amendment

necessary. But I am of opinion that in this particular case no amendment was necessary.

Although the names were not placed in the proper list as intended by the statute, no one could be misled by that, inasmuch as the objection to each name is distinctly specified and set forth opposite to each name; and the complaint is that the names in the list No. 2 are wrongly stated in the voters' list, as shewn in said list No. 2. The forms prescribed by the Act need not be followed with exactness. What the Act, sec. 4, declares is, that the forms set forth in the schedule, or forms to the like effect, shall be deemed sufficient for the purposes mentioned in the schedule. So long as the nature of the objection to any particular name on the list is made reasonably clear by the notice, that, in my opinion, is sufficient, even if the form in the schedule to the Act be not followed at all.

The complaints should, therefore, be referred back to the learned Judge to be heard and disposed of according to law.

CARTWRIGHT, MASTER.

DECEMBER 2ND, 1903.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. STRATFORD.

Summary Judgment—Motion for—Action on Covenant in Mortgage—Defence—Denial of Execution and Consideration.

Motion for plaintiffs for summary judgment under Rule 603.

The action was brought to recover the amount due under a covenant for payment contained in a mortgage deed purporting to be executed by defendant (and his wife to bar dower), on 27th May, 1893, and witnessed by a law student in the office of the solicitors of plaintiffs.

The writ of summons was issued on 26th August, 1903. Interest was claimed from 27th May, 1895, only. The defendant was served on 29th August, and entered an appearance.

Before action defendant had had some correspondence and other negotiations with plaintiffs' solicitor, in which he did not repudiate his liability, and offered to give a note for \$50 to obtain a release.

In answer to the motion defendant made an affidavit denying that he ever executed a mortgage to plaintiffs, and that he ever received from them the consideration of \$325 stated.

F. J. Dunbar, for plaintiffs.

W. J. Elliott, for defendant.

THE MASTER.—Defendant was cross-examined upon his affidavit. He seems to have been a very straightforward and candid witness, and I have no doubt he honestly believes that in some way he was tricked into signing the mortgage and other documents connected with the loan, if the signatures are really his. He will not positively deny that they are his.

Neither the wife nor the witness to the mortgage was asked to give any evidence on the motion.

It is to be observed that defendant never paid any interest on the mortgage, nor was he ever asked to do so. Yet plaintiffs give credit for the interest for the first two years. By whom this was paid has not been shewn. . . .

[Jacobs v. Booth's Distillery Co., 85 L. T. R. 262, and Munro v. Orr, 17 P. R. 53, referred to.]

Under all the facts of this case . . . I think there is a triable issue to go before a jury as to whether the mortgage in question was the genuine and bona fide act of defendant.

Motion dismissed. Costs in the cause.

CARTWRIGHT, MASTER.

DECEMBER 2ND, 1903.

CHAMBERS.

WILLIAMS v. HARRISON.

Writ of Summons—Renewal after Expiry—Statute of Limitations—Setting aside ex Parte Order—Material Evidence Withheld.

Motion by defendant Joseph Harrison to set aside an order of 26th August, 1903, made by a local Judge, on the ex parte application of plaintiff, for the renewal of a writ of summons issued on the 1st May, 1900, in an action upon promissory notes, and the renewal and service on the applicant.

It was admitted that the writ had expired on the 1st May, 1901, and had not been renewed before the order in question, and that recovery on the notes was barred by the Statute of Limitations, unless the action saved the plaintiff's rights.

T. P. Galt, for applicant.

C. A. Moss, for plaintiff.

THE MASTER.—The original order was before me, and is stated to be made "on reading the affidavit of E. L. Dicken-

son, filed, and upon hearing the solicitor for the plaintiff." So I must assume that this was all the material laid before the local Judge. . . . That affidavit . . . states the facts to a certain extent; but no mention is made of the writ, nor of the dates of the notes sued on, nor of the fact that they were all barred on the 6th May, 1901, more than two years before the order now under consideration. . . .

[Doyle v. Kauffman, 3 Q. B. D. 7, and Hewett v. Barr, [1891] 1 Q. B. 98, referred to.]

Canadian Bank of Commerce v. Tennant, ante 277,393, 5 O. L. R. 524, shews that I am competent to entertain the motion, but that I can rescind the order only on the ground "that material evidence was withheld on the application." Now, in view of these two English cases and of the decisions in our own Courts, I think that this was the case, though I am satisfied that it was not intentional.

In the order of the local Judge there is no reference to the writ, nor is it made an exhibit to Mr. Dickenson's affidavit. There is nothing, therefore, to lead one to suppose that the bar of the statute had been brought to the notice of the Judge. Had this been done, it is not to be supposed that, in face of the authorities, the order would have been made; and, therefore, I feel justified in setting it aside, as I would do had I been led into a similar error, and as I did in Bolster v. Booth, ante 890. . . .

St. Louis v. O'Callaghan, 13 P. R. 322, is the only case that in any way favours the plaintiff. But it is said there that in the last renewal the affidavit on which it was granted expressly stated that "the Statute of Limitations had not run against the plaintiff's claim." . . .

I have not overlooked the vigorous contention of plaintiff's counsel that the discretion of the learned local Judge could not be interfered with. But, as was said in effect by Cockburn, L. C. J., in Doyle v. Kauffman, no Judge has discretion to interfere with the operation of a statute. It must, therefore, be presumed that there was no such intention, unless the contrary is proved beyond all possibility of doubt. . . .

The motion must be granted, and the order, renewal of writ, and service, set aside.

I think it is not a case for costs.

DECEMBER 2ND, 1903.

DIVISIONAL COURT.

ONTARIO PAVING BRICK CO. v. BISHOP.

Mechanics' Liens—Liability of Owner to Contractor—Completion of Work by Owner—Right to Set off Difference in Price.

Appeal by defendant Singer from the judgment of an official referee after the new trial of a mechanics' lien action by him pursuant to the order of a Divisional Court (ante 320). The action was brought by a material man who supplied materials to the contractor for the work done by him for the owner. The work was done by the contractor, the defendant Bishop, under an agreement with the owner (the appellant), and the work contracted for was the erection and completion of two brick houses in Crawford street, in the city of Toronto. By the terms of the agreement the work was to be completed on or before 14th August, 1902. The contractor proceeded with the work, but only a comparatively small part had been done on the 14th August, 1902. The owner entered into new contracts with other tradesmen for the completion of the work, and it was completed by them at his expense. The Referee decided that the owner was not entitled to set off against the value of the work done by the contractor the difference between the actual cost to the owner of the work and the price he had agreed to pay to the contractor.

W. E. Middleton and D. C. Ross, for appellant.

F. E. Hodgins, K.C., for the Rathbun Co., lienholders.

J. E. Irving, for plaintiffs.

J. E. Cook, for defendant Bishop.

THE COURT (MEREDITH C.J., MACMAHON, J., TRETZEL, J.) held that it was a proper conclusion from the evidence that there was an unqualified and absolute refusal by the defendant Bishop to go on with and complete the work on his contract after he had been more than once requested to do so, which evidenced an intention no longer to be bound by the contract, and justified the appellant in proceeding to complete; and the appellant was, therefore, entitled to recover the damages sustained by him owing to the default of defendant Bishop in the performance of his agreement. These damages exceeded the amount found due to defendant Bishop.

Appeal allowed with costs, and judgment appealed from set aside in so far as it affects the appellant, and action as to him dismissed with costs.

MEREDITH, J.

DECEMBER 3RD, 1903.

CHAMBERS.

HENNBECKER v. McNAUGHTON.

Costs—Leave to Appeal as to—Ex Parte Application—Discretion of Trial Judge—Scale of Costs.

Motion by plaintiff ex parte for leave to appeal from the order as to costs made by MEREDITH, J., upon the trial of the action.

MEREDITH, J.—The application should have been made when the order was pronounced, and should not generally be made ex parte at any time; but, if the applicant had made out a prima facie case, I should have directed notice to be given so that the subject in all its bearings might be discussed. . . . That, the first stage, however, fails.

The only ground upon which leave is sought is, practically, that the question might be better argued if plaintiff were given another chance. But in that I cannot agree. Counsel for plaintiff left nothing unsaid at the trial that usefully could be said in support of the desire for more costs.

I was, and am yet, of opinion that my discretion upon the subject was exercised as favourably towards the plaintiff as it rightly ought to have been, and that leave to appeal ought not to be given, unless, indeed, the intention of the Legislature to prevent much litigation over the mere question of costs, is to be frustrated. The subject was put in the discretion of the trial Judge, to be under ordinary circumstances and very generally determined by him.

The case is not one of any magnitude in any sense, and is one which, if the parties really wished to avoid costly litigation, might very well have been worked out in a lower Court. The plaintiff was too ready, if not eager, for litigation, and for an action in the High Court. It is not unusual for one who has paid his debt to bring an action to establish the fact by a judgment of the High Court. It need hardly be said that generally there is no ground for such litigation, and that no sort of encouragement should be given to it, else we might have persons litigiously built frequently bringing actions for a "declaration" of the Court that this or that trivial debt had been paid or satisfied. It is better to wait until sued in

the Division or County Court and there to plead payment. There was really no good ground for any injunction in this case; the real, the sole, substantial question was whether the small amount actually in dispute, and in respect of which any judgment of the Court was given, had been paid, that is, whether the witness Keene was or was not authorized by the defendants to receive for them the payments admittedly made to him by the plaintiff.

No order.

HODGINS, LOC.J.

OCTOBER 17TH, 1903.

DECEMBER 3RD, 1903.

EXCHEQUER COURT OF CANADA.

TORONTO ADMIRALTY DISTRICT.

REX v. THE "KITTY D."

Ship—Foreign Fishing Vessel—Seizure for Fishing in Canadian Waters—International Boundary Line—Rules for Determining Dispute as to Situation of Vessel when Seized—Appreciation of Evidence—Certificate of Probable Cause for Seizure—Costs.

The "Kitty D.," a fishing vessel, owned in the United States, was seized by the Canadian cruiser "Petrel" in Lake Erie, on the 3rd July, 1903, under R. S. C. ch. 94, for alleged fishing north of the international boundary line between Canada and the United States.

E. L. Newcombe, K.C., and L. Kinnear, for the Crown.

W. M. German, K.C., for the owners.

C. H. Ritchie, K.C., for the Government of the United States.

HODGINS, LOC. J.—The question in this case is whether a seizure of the United States fishing boat "Kitty D." by the Dominion cruiser "Petrel" on the 3rd July last for alleged fishing, was made in Canadian waters, north of the international boundary line.

Captain Dunn, of the cruiser, stated that he left Port Dover on that morning at 6.30 o'clock and directed his officers to take the course to clear Long Point S.E. by S. $\frac{1}{4}$ S., which was the usual course in calm weather, but, owing to the variation of the compass, the true course would be represented by E. by N. $\frac{1}{4}$ N. That he set the log when they were immediately abreast of the Long Point light-house,

from which he was approximately about five-eighths of a mile; that after registering five knots he turned the "Petrel" on her course down the lake and ran down the boundary line E. by N. $\frac{1}{2}$ N.; that shortly before noon the second officer came and told him there were two tugs, one of which was nearly directly ahead a little to the port, and the other away to the north of the boat; that he turned to the one on the north, which was about two miles off, and made a crescent towards the north-west for about ten minutes, and then south-west, and signalled her to slack speed and so overtook and seized her. The distance of these different crescent courses was not stated.

The other witnesses for the Crown were, first, Officer Inkster, who stated that the "Petrel" left Port Dover at 6.30 o'clock that morning; that the usual course in calm weather was S.E. by S. $\frac{1}{4}$ S.; that he was on the bridge until 8 o'clock, when she was steering E. by S. $\frac{1}{4}$ S. from Port Dover; and that they passed Long Point about 8.30 at the distance of about half a mile.

Second Officer McPherson corroborated the first officer as to the course of the "Petrel" on the 3rd July, except as to the steering E. by S. $\frac{1}{4}$ S.—he making it S.E. by S. $\frac{1}{4}$ S. He also said that he could not tell whether they were south or north of the international boundary line; and he estimated that they were about one half mile from Long Point when the log was set, which he says is the usual distance, though it might vary several hundred yards.

The seamen who steered the "Petrel" on that day were also examined. Slade said that when he took the wheel the vessel was steering S.E. by S. $\frac{1}{4}$ S., thus confirming Second Officer McPherson, but when asked the nature of the turn from S.E. by S. $\frac{1}{4}$ S. he gave the course E. by N. $\frac{1}{2}$ N. He admitted that he had only been a mariner for one season, and had not much experience in steering, and that he was not known in marine circles as a "wheelsman," and that this was the first time he had steered from abreast of Long Point out to the boundary line.

Campbell said that when he took the wheel at 10 o'clock the "Petrel" was steering E. by N. $\frac{1}{2}$ N., and that he continued on that course; that he had never steered a boat until this summer. Neither of these seamen knew anything about a compass prior to their going on the "Petrel" last April.

Captain Spain gave evidence that he came to Port Colborne on the 8th July and hired the "Golden City" and steered out into the lake to see if he could find the nets of the "Kitty D.," which were reported to have been left in the

lake, and that he was accompanied by Captain Jones, of the "Kitty D.," and Mr. Dechart, one of the owners. He suggested that Captain Jones should take the wheel, but the captain of the "Golden City" did not give it to him. Jones then offered that if he were taken across to Dunkirk and could start from there, as he knew that course, he could find the "Kitty D.'s" nets, and he described to Captain Spain the kind of buoy attached to the nets of the "Kitty D." Jones's offer was, however, declined, and the "Golden City" returned, after failing to find the place where the "Kitty D.'s" nets had been set. Captain Spain further stated that the "Petrel" left Port Colborne on the following morning at 6 o'clock, and that he instructed Captain Dunn to go to Long Point and take the course he had reported to him he had taken on the 3rd July, S.E. by S. $\frac{1}{4}$ S., for five miles out; that after steaming out for about five miles from Long Point he said they got to about a mile and three quarters north of the boundary line, and, owing to not having allowed for the over-registering of the log, the "Petrel" was a little further out than that. He also estimated from Captain Dunn's report that the place of seizure was $9\frac{3}{4}$ knots from Lapp Point on the Canadian shore; and he shewed that the British chart made Lapp Point $10\frac{1}{2}$ miles from the boundary line, though the real boundary line there is $11\frac{1}{4}$ miles. According to his estimate the "Kitty D." was three-quarters of a mile north of the Canadian side of the boundary line, to which he would add on the statement of Captain Jones that the place of the "Kitty D.'s" nets was "five minutes north," a further three-quarters of a mile—making in all $1\frac{1}{2}$ miles north on the Canadian side. But he admitted that he could only give the distances approximately.

The only witnesses for the Crown who gave evidence of the locality of the seizure, were Captain Dunn and Captain Spain, the latter only estimating the locality of the seizure on the report made to him by Captain Dunn.

The following may be taken as a fairly condensed summary of the defendants' evidence as to the seizure of the "Kitty D." on the 3rd July.

Jones, her captain, said that he started from Dunkirk about five o'clock that morning and steamed out for about an hour and five minutes N. by W. $\frac{1}{2}$ W. to where he had set his nets east by south on the 2nd July; that the buoy of his nets was about $9\frac{3}{4}$ miles from Dunkirk; and that his ship was seized by the "Petrel" at that distance from the United States shore. He also steamed out on the "Desmond" on the same course, $9\frac{3}{4}$ miles, and found his nets, and that one

of the corks was then taken off with the owner's mark "R. and D." on it, and that all the nets remained out until the 26th July, when they were taken up except one which he left, and he asserted that he was fishing at the time of seizure on the United States side of the boundary line, and so stated to the captain of the "Petrel."

Dewitt, one of the hands on board the "Kitty D.," said they left Dunkirk about five or half past or six o'clock, and steamed out into the lake for somewhere in the neighbourhood of an hour. He also said that about the end of July he saw the "Kitty D.'s" buoy and fished around it.

Helwig, the captain of the tug "Lucy," said that on the 3rd July he was out from Dunkirk about 9 or 10 miles, lifting his nets; that he was a little to the north of the "Kitty D." with his outer net; that he saw the "Petrel" go to the westward and seize the "Kitty D.;" that on the 4th July he found that the "Kitty D.'s" nets, which had been set on the 3rd, had crossed his, which he had previously set on the 2nd July north and south; that his most northerly nets were a mile to the north of the "Kitty D.'s;" and he was positive that the "Kitty D." was in United States waters at the time of the seizure; and that his outer (north) buoy was also in the same water.

Connor, the engineer of the "Lucy," said that on the 3rd July they were about a mile north of the "Kitty D." and saw the seizure; that their nets had been set on about the 2nd July north and south; and that in lifting them on the 4th they found that the nets of the "Kitty D." which had been set on the 3rd, had crossed the "Lucy's;" that their outer buoy was about a mile north of the "Kitty D.'s" nets. He also stated that it took him about thirty minutes to get to his inside buoy, and that his nets extended out $3\frac{1}{2}$ or 4 miles and made their distance from Dunkirk about 7 or 8 miles. And he also said that at the time of the seizure the "Kitty D." was in United States waters.

Captain Howison, of the United States navy, who had been sent by the Secretary of the Treasury of the United States to investigate the case, said that on the 27th July he left Dunkirk on the United States revenue cutter "Fessenden," preceded by the tug "Desmond" to shew him the locality of the "Kitty D.'s" buoy; that they found it, and had two corks taken off marked "R. & D.;" and on returning to Dunkirk he logged the distance from the "Kitty D.'s" buoy, which he found to be $9\frac{1}{2}$ statute miles. He further stated

that the international boundary line is about $11\frac{1}{2}$ miles from Dunkirk, and a little over 2 miles north of the western buoy of the "Kitty D.'s" nets. He also stated that from where he found the buoy he could see the American shore, but not very well the Canadian shore.

Mr. Harvey, Consul of the United States at Fort Erie, went out from Dunkirk on the "Desmond" on the 7th July to the western buoy of the "Kitty D.'s" nets, Captain Jones, of the "Kitty D.," and others, being with him; that the time going out was one hour and six minutes; that he logged the distance, which he found to be $9\frac{3}{4}$ miles; that he took off a cork with the initials of the owners, "R. & D.," on which he put his own initials, and produced it at the trial; that in returning to Dunkirk it took one hour and seven minutes; and that the log shewed $9\frac{3}{4}$ miles from where the "Kitty D.'s" nets were found.

Donnelly, the captain of the "Desmond," said he was setting nets on the 3rd July and saw the "Kitty D." while about a mile south-east of the "Desmond"; that he was then about 7 or 8 miles from Dunkirk. He saw the "Kitty D." seized. He further said that he went out on the "Desmond" on the 7th July with Mr. Harvey, Captain Jones, and Mr. Ryan, one of the owners of the "Kitty D.," to take the distance from the shore to the "Kitty D.'s" buoy, and found the buoy, and took off one of the corks with "R. & D." on it; that the distance from Dunkirk to it was $9\frac{3}{4}$ miles, and that the time occupied was 1 hour and 6 minutes; and that on logging back the distance they found it the same.

Burns, captain of the fishing tug "Charm," also went out on the "Desmond" on the 7th July, and found the buoy of the "Kitty D.'s" nets less than $\frac{1}{8}$ of a mile of $9\frac{3}{4}$ miles' distance from Dunkirk, and took off a cork marked "R. & D." He also said that the place where they found the buoy was about $2\frac{1}{2}$ miles on the United States side of the boundary line.

Jones, on being recalled, stated that when he took Captain Howison out they went to the most northerly buoy of the "Kitty D.'s" nets.

Dechart, one of the owners, who went with Captain Spain on the "Golden City" on the 8th July, and on the "Petrel" on the 9th July, to find the "Kitty D.'s" nets, stated that they were unable to find their locality on both occasions.

From the above it will be seen that the weight of evidence as to the place of the seizure of the "Kitty D." is with the defence.

But there are also incidents to be taken into consideration which seem to be material to the decision. In taking the turn into the lake from Long Point on the 3rd July Captain Dunn stated that the rounding of the "Petrel" might increase the outward distance from Long Point by, say, 200 yards, and it might throw the ship out of her bearings that much, and that the turning might fluctuate from 200 to 500 yards off Long Point, which would seem to throw doubt as to the locality where the turning to the international boundary line actually took place; and to this he added that in taking a course along the international boundary line, there would, of course, be some deviation from a straight course to the right or left—a fact which it is reasonable to assent to, seeing that the vessel was proceeding on a liquid highway and out of sight of any distinctive land-mark on the shores; and on this day, through an atmosphere described in the log-book "wind, light, baffling to calm, heavy thunder squall with rain," and by several witnesses as cloudy, raining, misty; weather thick, kind of squally, rainy weather, quite a storm came up that day.

Then with these atmospheric difficulties there was the inexperience of the seamen in the practice of steering a ship, and their recent acquaintance with the points of a ship's compass, which leaves it somewhat doubtful as to their knowledge of its deviations, and especially, as it came out in the evidence, that the change of a quarter of a point in a compass would make a difference of a mile and a half right or left in a vessel's course over a distance of some 30 miles.

Add to this the fact that the buoy of the "Kitty D's" nets was a red pole, ten feet high, with an oil skin flag at the top, then a piece of a pair of overalls, and next below a piece of shirt, which neither on the search of the "Golden City" on the 8th, nor the search of the "Petrel" on the 9th July, was discovered—although the course of the "Petrel" on the 9th July is said by Captain Dunn to have been precisely the same as that taken by the "Petrel" the day he captured the "Kitty D."

Finally there are divergencies in the charts and in the estimates given by some of the witnesses of the distance of the international boundary line from both the Canadian and United States shores.

It has been well said by Judge Black, of the Quebec Admiralty Court, that "statements as to time and distance in maritime cases are probably more or less erroneous." And Sir William Scott, when dealing with the evidence of estimated distances at sea in the case of the "Twee Gebroeders," 3 Rob. at p. 163, says: "An exact measurement cannot be

easily obtained; but in a case of this nature, in which a Court would not willingly act with an unfavourable minuteness towards another State, it will be disposed to calculate the distance very liberally." And this conclusion was approved by the United States Admiralty Court in *Soult v. "L'Africaine,"* Bee's Admiralty Reports 205. For, as Sir William Scott afterwards said, in the "*Twee Gebroeders*" case, on p. 338, "it is scarcely necessary to observe that a claim of territory is of a most sacred nature. In ordinary cases, where the place of capture is admitted, it proves itself;" but he added that it is otherwise when it happens in places where it is contended that no right exists, and then the facts on which the right depends must be competently established.

These cases sustain the doctrines of international law which have been thus fairly stated in Barr's *Private International Law*, pp. 1067-8:—"In the case of any real doubt, the decision must be against the subjection of a ship to a territorial sovereignty. The hull of the ship presents at once to the mind the notion of the subjection of that ship to the law of her own flag. We cannot regard that subjection as removed, unless some sensible and unmistakable cause for its removal has intervened. Any other determination of the question would involve legal relations in uncertainty and confusion.

"On land-locked lakes surrounded by several States, the same principles as regulate the application of territorial law on dry land must rule, in so far as there are distinct boundary lines recognized. The well known rule for fixing these is that the centre of the lake determines them just as is the case with rivers. But if there is a condominium of the surrounding States, we are forced to consider a ship in matters of civil law, while she is on a voyage on the lake, as a part of the territory from which she hails, just as we do in the case of a ship upon the high seas. As regards contentious jurisdiction, there is a question about arresting a ship, but this expedient seems not to be desirable, because it might easily be abused, and would be exceedingly apt to lead to a small warfare of jurisdictions."

On the facts disclosed in the evidence, and aided by the authorities cited, I must find that the locality of the "*Kitty D.'s*" fishing on the 3rd July last, was not within the Canadian waters on the north of the international boundary line in Lake Erie, and that her seizure on that day by the cruiser "*Petrel*" cannot be sustained; and an order will issue for her restoration to her owners.

After the foregoing judgment had been delivered, the Crown counsel moved for a certificate of "probable cause for the seizure" under sec. 15 of R. S. C. ch. 194.

L. Kinnear, for the Crown.

W. M. German, K.C., for the owners.

HODGINS, LOC.J.—Since disposing of this case, the counsel for the Crown has moved for a certificate, under sec. 15 of the Act respecting Fishing by Foreign Vessels, R. S. C. ch. 94, that there was "probable cause" for the seizure of the "Kitty D." on the 3rd July last. That section provides that if such certificate is issued the owners "shall not recover more than four cents damages, and shall not recover any costs, and the defendant shall not be fined more than twenty cents." But I think sec. 20 of the Act relieves me of this responsibility of considering whether such a certificate should issue or not; for that section declares that "the Act shall apply to every foreign ship, vessel, or boat, in or upon the inland waters of Canada." My finding on the evidence was that this foreign ship "Kitty D." was not "in or upon the inland waters of Canada" at the time of her seizure, and I must therefore hold that such finding negatives the statutory power to grant the certificate moved for.

By Rule 132 of the General Rules in Admiralty cases, it is provided that costs are to follow the event, and under that rule the owners are entitled to their costs of this action against the Crown.

OSLER, J.A.

DECEMBER 5TH, 1903.

CHAMBERS.

RE WAY.

Will—Construction—Bequest of Personal Effects—Mortgage—Liability for Debts and Expenses of Administration.

Motion by executors under Rule 938 for order declaring construction of will of James Way, and for directions to executors. The testator died on 15th February, 1893. By his will, dated 10th January, 1876, he directed that his debts and funeral expenses should be paid by his executors, and the residue of his estate, real and personal, which should not be required for the payment of his just debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate, he gave as follows: To his wife all his furniture, books, plate, and other personal effects; and so long as she remained his widow he devised to

her all his real property for her sole use and benefit so long as she should live; but if she should marry again she was to have one-third of the rents for life, and his daughter Eliza, being unmarried, should have the full use and benefit of two-thirds of the rents or net proceeds of the real estate until she marries or dies—"In the event of her marriage or death and my said wife being living but married again, then the two-thirds as aforesaid shall be from time to time equally divided amongst my children in Canada until the death of my wife. In the event of the death of my wife previous to the marriage or death of my daughter Eliza, then the said Eliza shall have the full use and benefit of the whole of the rents or net proceeds of my said real estate until she marries again. As soon as may be convenient after the death of my wife and the death or marriage of my said daughter, the property shall be sold and the proceeds divided" (among children and grandchildren). The testator left him surviving his widow and five daughters, all married, one being his daughter Eliza mentioned in the will. The daughters were still living. The widow died on 14th November, 1902, having made a will in favour of her daughter Sarah Jane Way. The estate of the testator consisted of household furniture and chattels valued at \$250; policy of life insurance, \$150; two parcels of real estate, valued at \$2,400; and a mortgage on real estate. The testator's debts and funeral expenses and the expenses attending the execution and probate of his will were paid out of the insurance moneys. The real estate had not been sold, and the executors had not received any remuneration.

J. Dickson, Hamilton, for the testator's daughter Louisa May Robins, contended that the mortgage did not pass under the bequest to the widow, and also that it was liable, in priority to the real estate, to the payment of all his debts, funeral expenses, and expenses attending on the execution of his will and the administration of his estate.

D'Arcy Tate, Hamilton, for the daughter Sarah Jane Way, contended that the widow took the beneficial interest in the mortgage.

OSLER, J.A.—. . . In my opinion the beneficial interest in the mortgage passed to the widow. Taking the whole clause in which the bequest of the personalty is found, it is in express terms a gift of the residue (Williams on Executors, vol. 2, p. 1317), and if the words "and other personal effects" are not cut down by the words which precede them, they are wide enough, having regard to the large meaning of the word "effects" (Roper on Legacies, 2nd Am. ed., pp.

279, 280, Am. & Eng. Encyc. of Law, 2nd ed., vol. 10 p. 448), to include a mortgage or other chose in action. Then, are they restricted by the preceding words to things ejusdem generis with property which these words describe? If the gift were not in terms or in effect residuary, and the will contained other dispositions of the personal estate, there might be room to infer that the testator was not using the general words in their larger sense. As it is, he shews that his intention was to dispose of the whole of his personal estate (of which at the date of his will the mortgage formed part), and unless the words he has used were given their larger meaning, his intention would be frustrated, and part of the residue would remain undisposed of, a result which is always, if possible, to be avoided, and which nothing in the will invites: *Hodgson v. Jex*, 2 Ch. D. 122; In the Goods of *Jupp*, [1891] P. 300; In the Goods of *Shepherd*, 48 L. J. N. S. P. D. 62; *King v. George*, 4 Ch. D. 435; *Dunally v. Dunally*, 6 Ir. Ch. 540.

The whole of the property of the deceased being charged by his will with the payment of his debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate, and the bequests and devises to the widow and others being residuary, the question whether the mortgage debt is liable in priority to the real estate for these expenses, is answered by sec. 7 of the Devolution of Estates Act, R. S. O. 1897 ch. 127, which enacts that the real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear) be applicable ratably according to their respective values to the payment of his debts. As to funeral and other expenses, although the section is silent as to these, the result ought to be the same: *Re Thomas*, 2 O. L. R. 660, 664. Order declaring accordingly.

ERRATUM.

Page 1044, ante, 9th line from bottom. For "H. S. Osler, K.C.," read "W. R. Riddell, K.C., and W. E. Foster."

THE ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING DECEMBER 14TH, 1903.)

VOL. II. TORONTO, DECEMBER 17, 1903. No. 43.

MEREDITH, C.J. NOVEMBER 20TH, 1903.
CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO. v.
LEADLEY.

SASKATCHEWAN LAND AND HOMESTEAD CO. v.
MOORE.

*Solicitor—Authority to Bring Action in Name of Company—
Determination of Question—Stay of Action.*

Appeals by plaintiffs from orders of Master in Chambers,
ante 944.

W. N. Ferguson, for plaintiffs.

J. W. St. John, for defendants the Leadleys.

A. J. Russell Snow, for defendant Moore.

MEREDITH, C.J., dismissed the appeals. Costs in the
cause.

MACMAHON, J. DECEMBER 7TH, 1903.
CHAMBERS.

FLYNN v. TORONTO INDUSTRIAL EXHIBITION
ASSOCIATION.

*Pleading — Statement of Claim — Action for Personal In-
juries—Negligence—Defective Construction of Machine
—Allegation that Defendants Insured against Accident
—Irrelevancy—Striking out.*

Appeal by plaintiff from order of Master in Chambers,
ante 1047, striking out the 9th paragraph of the statement of
claim.

W. N. Ferguson, for plaintiff.

G. L. Smith, for defendants.

MACMAHON, J., dismissed the appeal with costs to defendants in any event.

BOYD, C.

DECEMBER 7TH, 1903.

CHAMBERS. . .

RE MCKENZIE.

Will—Legacy—Ademption—Parol Evidence—Issue Directed to be Tried.

Motion by executor under Rule 938 for order declaring construction of will of William McKenzie, late of the town of Kincardine, farmer. The will was divided into clauses:—(1) directing payment of debts, etc.; (2) a bequest of \$500 "to my housekeeper Flora Fraser, to be paid her as soon as possible after my decease;" (3) to the testator's brother Hugh McKenzie the right to use and occupy a house and lot in Kincardine and to use fruit growing on the lot; (4) a devise to Flora Fraser for life of a house and lot in Kincardine; (5) "I will, devise, and bequeath to Hugh Graham, executor and trustee of this will, all my real and personal property . . . after the payment of the bequest in clause 2, and when the bequests in clauses 3 and 4 expire by the death of the parties mentioned therein, in trust to support and maintain . . . Flora Fraser for . . . life." (6) "Whatever remains of my estate after the keep and support of . . . Flora Fraser during her life shall be paid over to my nephew John McKenzie, his heirs and assigns forever." The question was as to ademption of the legacy of \$500 by payments in the testator's lifetime.

C. C. Ross, for executor.

J. H. Moss, for Flora Fraser.

T. D. Delamere, K.C., for the other beneficiaries.

BOYD, C., held, following *Re Smythies*, [1903] 1 Ch., that this must be regarded as a legacy given merely for bounty, and not for a particular purpose. No purpose is referred to in the will, and one cannot be imported into the case as the legal effect of acts done in the lifetime of the testator. *Re Fletcher*, 38 Ch. D. 375, referred to. Apart from the affidavits, the will contains a plain direction to pay \$500 to the beneficiary. Having regard to *Tuckett-Lawry v. Lamoureux*, 1 O. L. R. 364, 3 O. L. R. 577, evidence of intention is admissible, and if the parties seek to litigate further as to the effect of the evidence, an issue will be directed, but with this proviso, that if the result is that the decision in favour

of the legacy stands, the party seeking the issue shall pay the additional costs, unless for good reason he is excused by the trial Judge. If no issue, costs of application to all parties out of the estate.

BOYD, C.

DECEMBER 7TH, 1903.

TRIAL.

HACKETT v. COGHILL.

Lien — Repair of Ships — Possessory Lien — Parting with Possession—What Amounts to—Floating Ships on Navigable Waters—Caretaker for Owners.

Action to recover the value of work done in repairing vessels and to establish a lien therefor on the vessels.

R. C. Clute, K.C., and W. H. B. Spotton, Wiarton, for plaintiff.

L. V. McBrady, K.C., for defendants.

BOYD, C.—The single issue which came before me for trial was, whether or not plaintiff had a lien for his charges to any extent upon the dredge and scows owned by defendants. Plaintiff's claim is in respect of repairs done upon these vessels when they were hauled out in the harbour at Wiarton. After the work was done the vessels were respectively restored to the water and taken first to the dock belonging to Castner and afterwards to the old dock erected by the town, which was in common and public use even after the erection of a new dock by the town about two years ago. When lying at the old dock plaintiff put lock and chain upon the dredge and notified the owners, but before this he says that he had tied up the vessels at this dock and claimed to be in possession of them.

The evidence shews that plaintiff had permission from the owner to use Castner's dock, and from the town authorities to use the old dock, by verbal license, for the purpose of his business in repairing vessels. The legal possession of the water lots on which the mooring existed at the time of the dispute as to possession which is now being litigated, was vested in the Crown. . . . It is further in evidence that the owners had a person in possession of the dredge for the purpose of looking after it and keeping the machinery in proper order, and he was on the boat at the time it was chained up by plaintiff.

Upon this state of facts it appears to be impossible to support the claim of plaintiff to a lien on the vessels. His

right exists only at common law to a possessory lien, and the origin and extent of that lien is defined by Buller, J., in *Lickbarrow v. Mayor*, 6 East 25 n., thus: "Liens at law exist only in cases where the party entitled to them has the possession of the goods, and if he once part with the possession after the lien attaches, the lien is gone."

Later cases shew explicitly that one necessary ingredient of lien is that the person claiming it should have full possession, meaning thereby exclusive and continuous possession, and, if the things are moved from the place of repair, it must be to a place where absolute and entire dominion over them can be retained—a thing which can rarely be done: see *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227, at p. 238; *Ex p. Willoughby*, 16 Ch. D. 610, 612.

When the vessels in this case were floated, it was on navigable water, and when they were tied up it was at first to a place where plaintiff had only permission to go from Cestner, and ultimately to a dock which was in public use and to which plaintiff has no exclusive possession or right of access . . . [Reference to *King v. Indian Ordnance Co.*, 11 Cush. 231; *The Scio*, L. R. 2 Ad. & Ecc. 353, 356.]

Still further, the acts of removal and tying up were not done by plaintiff alone, but in conjunction with the employees of the defendants and the agent of the owner.

That possession was not retained by plaintiff on the moving of the vessel to the dock, is evident from the presence on board the dredge as caretaker and agent of the owners of a succession of persons following each other down to the date of the litigation. It may be that there is no need to keep the vessel within the premises of the repair-man to preserve the lien, and that placing a ship-keeper aboard to retain possession for the lien-holder when the ship is floated on public waters, might suffice, as was suggested and apparently sanctioned in *British Engine Co. v. Ganes*, E. B. & E. 361 (affirmed, 8 H. L. Cas. 340). But here that act of supervision was attended to by and in the interest of the owners, and affords a visible token of their being in possession throughout.

There can be no intermittent possession and such a lien—once lost it is gone and cannot be restored by repossession: *Hartley v. Hindcock*, 1 Stark. 408; *Jones v. Peart*, 1 Stra. 130; *Forth v. Simpson*, 13 Q. B. 680; *Reilly v. McIlmurray*, 22 Q. B. 167.

My decision is against any right to hold the vessels for the payment of the debt, and they must go to the possession of the owners as against this claim of plaintiff.

DECEMBER 7TH, 1903.

C.A.

RE NORTH NORFOLK PROVINCIAL ELECTION.

SNIDER v. LITTLE.

RE NORTH PERTH PROVINCIAL ELECTION.

MONTEITH v. BROWN.

*Parliamentary Elections—Controverted Election Petition—
Extending Time for Trial—Fixing Day for Trial—
Grounds for Extension—Order—Appeal.*

Appeals by Little and Brown, the successful candidates, from orders made by OSLER, J.A., on the 11th November, extending the time for the commencement of the trial of the petitions against their respective elections, until 31st January, 1904.

J. P. Mabee, K.C., for the respondent Brown.

H. L. Drayton and A. G. Slaght, for the respondent Little.

J. Baird, for the petitioner Monteith.

E. B. Ryckman, for the petitioner Snider.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, MACLAREN, J.J.A., STREET, J.), was delivered by

MOSS, C.J.O.—On the 5th November an application was made on behalf of the petitioners, Messrs. Snider and Monteith, to Mr. Justice Osler, one of the Judges on the rota, to fix days for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficulty of immediately communicating with them, the learned Judge was unable to fix dates on which it was certain that the four Judges required would be able to proceed with the trials. The respondents were not prepared to agree to an extension of time, and the application to fix the date of trial stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before Mr. Justice Osler on affidavits, and the orders now appealed from were made.

The grounds of appeal chiefly relied on are, that no material or sufficient facts or circumstances to justify the extension of time were shewn; that the petitioners were guilty of delay; and that there were no substantial reasons upon

which a judicial discretion might or ought to be exercised in favour of the applications.

Section 47 of the Controverted Elections Act enacts that, subject to the provisions of sec. 48, the trial of every election petition shall be commenced within 6 months from the time when the petition was presented, and, so far as practicable, shall be proceeded with *de die in diem*, unless on application supported by affidavits it is shewn that the requirements of justice render it necessary that a postponement of the case should take place.

The section further enacts that an application to postpone the case or extend the time for fixing the day of trial may be made to a Judge of the Court of Appeal at any time before the expiration of the 6 months, and the Judge may thereupon, in his discretion, postpone the case or extend the time for fixing the day of trial to a day before or after the expiration of the 6 months.

Section 48 enacts that in the computation of any delay allowed for any step or proceeding in respect of the trial or for the commencement of the trial under the 47th section the time occupied by the session shall not be reckoned.

The material dates are the following:—

1903.

Presentation of petition.....	February 4
Commencement of session.....	March 10
Prorogation	June 27
Application to rota Judge to fix dates of trial.	November 5
Motion to extend time.....	November 11

On the 10th March, when the session commenced, 1 month and 5 days had elapsed since the time of the presentation of the petition. From the 27th June to and inclusive of the 5th November, 4 months and 8 days elapsed, making together 5 months and 13 days, to be reckoned from the date of the presentation of the petition. There were therefore 17 days before the expiration of the 6 months. The last of these days would expire on Sunday 22nd November. Reckoning in the most favourable way for the respondents and excluding the following Monday, there remained the 20th and 21st November, for either of which the 15 days' notice of trial required by Rule 27 might have been given by the Registrar, if the learned Judge had been in a position to fix either or both of them as the days for the commencement of the trials. The applications to the rota Judge were therefore in time to enable the trials to be commenced within the 6 months, and the failure to fix days cannot be attributed to the petitioners.

The provisions bearing on the fixing of days are sections 16 and 47 of the Act, and Rules 26 and 27, and these leave the matter in the hands of the rota Judges. The petitions, as far as conveniently may be, are to be tried in the order in which they stand in the list to be prepared by the Registrar; the trials are to be commenced within 6 months from the presentation unless the time is extended; and the time and place of the trials are to be fixed by the Judges on the rota. And the fact that, owing to other engagements, the Judges were unable to commence the trials within the time limited should not prejudice the petitioners. Probably the only motion open to them, under the circumstances, was to extend the time for fixing the days of trial.

It was argued that the petitioners have shewn no diligence in preparing for trial, and that the affidavits shew that they would not have been ready to proceed on any of the days mentioned. But, if the days had been fixed, they would have been obliged to proceed, or shew good grounds for a postponement. If they proceeded, their want of preparation could be no disadvantage to the respondents, and if they applied for a postponement, their neglect to take the usual steps could be strongly urged in opposition to the application. While the lapse of 3 months from the presentation of the petition without the day for trial having been fixed, entitles any elector interested in the election to move under sec. 46 to expedite matters by procuring himself to be substituted for the petitioner, it is not open to the respondent to complain of lack of diligence by the petitioner within the 6 months—no days for trial having been fixed. If days had been fixed, and there were delays after that, different considerations might arise: *Re Addington Election*, 39 U. C. R. 131.

Much of what was necessary to be shewn on the application to extend the time transpired in the presence of the learned Judge, and the facts were within his own knowledge. There is no reason why he should not act upon that knowledge in considering the application to extend the time.

And having regard to the whole circumstances, the justice of the case was entirely in favour of making the orders. The learned Judge rightly exercised his discretion, upon sufficient grounds and for sufficient reasons appearing before him, and his orders should not be interfered with.

Having regard to the statute and Rules and the stage at which the applications were made, the appropriate form of the orders would seem to be to extend the time for fixing the days of trial rather than the time for the commencement

of the trial. If necessary, they may be amended in that respect.

The cases will then be left to be dealt with by the rota Judges along with the other petitions on the Registrar's list.

The appeals are dismissed. Costs in the petition.

CARTWRIGHT, MASTER.

DECEMBER 8TH, 1903.

CHAMBERS.

RE SOLICITORS.

Solicitor—Agreement with Clients—Retaining Gross Sum for Costs—Proof of Agreement—Application for Delivery and Taxation of Bill—Estoppel by Agreement.

Motion by solicitors to set aside a præcipe order for delivery and taxation of a bill of costs.

E. E. A. DuVernet, for the solicitors.

W. E. Middleton, for the clients.

• THE MASTER.—The solicitors set up an alleged agreement by the clients to accept \$200 in settlement of a claim, leaving the solicitors to get as much as they could for their costs from the opposite party. After some negotiations, and apparently after the issue of a writ of summons, a payment was made to the solicitors by the opposite party of \$300. Of this sum \$200 was paid by the solicitors to the clients, and the remainder was kept by the solicitors for their costs, no account of any kind being rendered. The clients and solicitors live in different but neighbouring towns, so that a considerable correspondence passed between them. . . .

[The Master set out the correspondence and referred to the affidavits.]

In my view, there is nothing in the correspondence to support any such agreement as is now set up by the solicitors. . . . Whether or not such a bargain was orally made it is idle to inquire. Anything of the sort is emphatically denied. In any case it was the duty of the solicitors to have preserved evidence that any such bargain, if made, was fully explained to the clients and accepted by them. The same rules must apply as in the case of a retaining fee and a retainer. I refer to what I said on this point in *Pirie v. McCann*, ante 546, and cases there cited. . . .

So far as I understand the law of this Province, a client is not estopped by such an agreement from claiming his right to delivery of a bill and taxation. The law in England is apparently different. *Re Chapman*, 20 Times L. R. 3, relied on by Mr. DuVernet, is therefore distinguishable, (1) on this ground, and (2) because the Court of Appeal thought the agreement savoured of an arrangement to stifle a criminal prosecution, and so declined to aid any of the parties concerned therein. . . .

[*Re Pinkerton and Cooke*, 18 P. R. 331, and *Re McBrady and O'Connor*, 19 P. R. at p. 44, referred to.]

An attempt was made some years ago to adopt the English law, but the bill was withdrawn, and has not since been brought before the Legislature.

The motion must be dismissed with costs to be set off against such costs as may be taxed on the reference, and the balance of the \$300 will be payable to the clients, together with the excess (if any) of the costs of this motion over what is taxed to the solicitors.

CARTWRIGHT, MASTER.

DECEMBER 8TH, 1903.

CHAMBERS.

APPLETON v. FULLER.

Parties—Joinder of—Several Torts—Actions for Penalties—Company and Agent—Election.

Action to recover penalties under 63 Vict. ch. 24 (O.) against the Eagle Lake Gold Manufacturing Co. and against one Fuller, as the company's representative. The statement of claim alleged (1) that the company had carried on business in Ontario without the necessary license, and had thereby rendered themselves liable to a penalty of \$50 a day for 87 days, counting from 23rd February, 1903, to the issue of the writ of summons, amounting to \$4,300; (2) that defendant Fuller had carried on business as the representative of the company since 23rd February, 1903, and had thereby incurred a penalty of \$20 a day for the same 87 days, amounting to \$1,740.

The defendants moved for an order requiring plaintiffs to elect against which defendant they would proceed.

J. B. O'Brian, for defendants.

Casey Wood, for plaintiffs.

THE MASTER:— . . . Under Rule 186, as explained in *Hinds v. Town of Barrie*, ante 995, it is impossible "to join claims against two or more defendants in respect of their several liability for several torts."

Mr. Wood suggested that in some sense it was really only one tort. But the answer is obvious. Either Fuller was acting as agent and thereby violating sec. 15 of the Act, or else the company were so acting and thereby violating sec. 14. That this suggestion was not the idea of the pleader is plain from there being a claim against each of the defendants and for a different penalty in each case. And it was long ago decided in *Hurdyman v. Whittaker*, 2 East 569 n., that, although in a proper case several defendants could be jointly sued in a *qui tam* action, only one penalty could be claimed or recovered.

The Act in question must be construed strictly. It nowhere has even a suggestion of both the company and their representative as agent being liable in respect of one and the same violation of the provisions as to obtaining a Provincial license. . . .

Even where the statute is plain, the Court does not favour *qui tam* actions. This is shewn by *Longeway qui tam v. Avison*, 8 O. R. 357, and cases cited.

The plaintiffs must elect within 14 days against which defendant they will proceed, and the action must then be dismissed with costs as against the other.

Under sec. 17 any further action against such other defendant will apparently be barred by lapse of time. It would appear from the statement of claim that the right of action must at the latest have arisen on the 21st May, when the writ was issued. It may be, however, that one or other of the defendants after that date continued to act without a license, and so may have incurred further penalties.

BOYD, C.

DECEMBER 8TH, 1903.

CHAMBERS.

RE WAGNER.

Devolution of Estates Act—Intestate Succession—Real Estate—Right of Half Sister to Share—Rights of Father—Assignment of Father's Interest—Impeaching—Issue—Costs.

Application by the administrator of the estate of Flora Mills Wagner, a deceased infant, for an order determining the rights of David Peter Wagner, Robert Mills, Edwin

Mills, Stanley Mills, and Lois Home Wagner in the estate of Flora Mills Wagner, and for directions to the administrator. Nelson Mills, of the city of Hamilton, died in 1876, leaving a will by which he gave all his estate to trustees in trust in the first place to pay his debts, etc., and in the second place for the use and benefit of his wife Cynthia Mills, and his children Charles, Stanley, Robert, Flora, and Edwin, in equal shares, and directed the trustees to set apart and allot to each child, upon his or her attaining 25 years, his or her share. The daughter Flora married David P. Wagner. The only issue of the marriage was the infant Flora Mills Wagner, who was born 25th March, 1889. Her mother died on the same day, her share of the estate having been previously allotted to and accepted by her. After her death it was agreed between David Peter Wagner, as guardian of the infant Flora Mills Wagner, and the trustees, that certain land in Hamilton should be allotted to the infant as her share of the interest of her mother in the estate of Nelson Mills. David Peter Wagner married again in 1891, and had issue one daughter, Lois Home Wagner, born in 1892. The infant Flora Mills Wagner died 22nd June, 1903. Robert Mills, Edwin Mills, and Stanley Mills claimed the estate of the deceased infant under an assignment from David Peter Wagner of 13th August, 1896. David Peter Wagner denied this claim, and claimed the estate absolutely. Lois Home Wagner claimed a share.

W. S. McBrayne, Hamilton, for the administrator.

H. E. Rose, for David Peter Wagner.

E. D. Armour, K.C., for the infant Lois Home Wagner.

A. B. Aylesworth, K.C., for the assignees of David Peter Wagner.

BOYD, C.—The Devolution of Estates Act passed in Ontario in 1886 makes a change amounting to a new rule in the law as to the succession to real estate of persons dying intestate, and directs generally that land shall be distributed as personal property among the next of kin of a person dying intestate. The original sec. 4 of the Act (49 Vict. ch. 22 (O.)) enacts that so far as real property is not disposed of by deed, will, etc., the same shall be distributed as personal property not so disposed of is hereafter to be distributed. . . . One of the changes made in the law of distribution alluded to in the "hereafter" of the 4th section, appears in the provision of sec. 6 (R. S. O. 1897 ch. 127) in regard to the case of a person dying intestate and without issue,

the father surviving. He shall not be entitled to any greater share under the intestacy than the mother or any brother or sister surviving. . . .

Section 6 has been construed to mean that the father has to share the intestate estate of his child with the brothers and sisters of that child and the children of deceased brothers and sisters, so that there shall be equality of distribution among father and all children, living and dead with issue: *Walker v. Allen*, 24 A. R. 340.

The section has been thus construed as giving in the case of the father that which was given in the case of the mother surviving by 1 Jac. II. ch. 17, sec. 7 (R. S. O. ch. 335, sec. 5.) The privilege of the parent to take all in certain cases was abrogated and distribution made among the other next of kin as specified. Now, under the statute of James it has been held that brothers and sisters of the half blood are equally entitled to share with those of the full blood: *Jessup v. Watson*, 1 My. & K. 655. This decision is conformable to the rule which has long obtained in the application of the Statute of Car. II. as to distribution, whereby the half blood has an equal share with those of the full blood, and the distinction was at an early date noted between the inferior position of those of half blood as to descents of land as compared with administration of personal estates, where those of half and whole blood were all one: *Earl of Winchelsea v. Norcliffe*, 1 Vern. 437; *Robbins on Devolution of Real Estate*, 3rd ed., p. 296; *Armour on Devolution*, p. 244. . . .

I think it may be taken as a canon of interpretation that the words "brother" and "sister" used in a context relating to the testamentary disposition of personalty or land treated as personalty import and include those of the half blood, if nothing appears to the contrary: *Greaves v. Rawling*, 10 Ha. 63; *Re Cozens*, [1903] 1 Ch. 138.

The proper construction of sec. 6 of the Act is to read "brother" and "sister" as including one who has either parent in common with another, and nothing in the later part of ch. 127 (touching the distribution of estates real affected by the Devolution of Estates Act) detracts from this being the meaning of the section in question.

I find, therefore, in favour of the infant being entitled to one-half of the estate divisible.

An issue will be directed to ascertain who is entitled to the other half, the father or those who claim as his assignees under the instrument which he impeaches. The plaintiff in the issue should be the father, who seeks to avoid the

instrument he has signed. Costs of that issue reserved and to be paid out of that moiety.

The costs of this inquiry as to the parties entitled to the corpus will come out of that corpus.

CARTWRIGHT, MASTER.

DECEMBER 9TH, 1903.

CHAMBERS.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Pleading—Statement of Claim—Irregularity—Delivery after Notification that Defendant does not Require—Defence and Counterclaim—Order for Production—Compliance with—Estoppel—Conformity to Indorsement on Writ of Summons—Immaterial Difference.

Motion by defendants to set aside the statement of claim for irregularity.

After the default judgment had been set aside (see ante 1030) defendants, on the last day for entering an appearance, namely, the 23rd November, appeared and at the same time filed a statement of defence and counterclaim; gave notice to plaintiffs that they did not require a statement of claim; and issued an order for plaintiffs to produce. This plaintiffs obeyed on the 3rd December, and on the same day delivered a statement of claim.

A. J. Russell Snow, for defendants, relied on Rule 171, which provides that if a defendant does not require plaintiff to deliver a statement of claim, he shall so state in his memorandum of appearance, and in that case shall serve a copy on plaintiff; and on Rule 247 as authorizing him to deliver a defence or counterclaim at any time within 8 days after appearance. He also contended that the filing of the affidavit on production by plaintiffs was an admission of the regularity of defendants' practice. He also urged that the statement of claim was irregular because it set up a different cause of action from that disclosed by the indorsement on the writ of summons.

C. P. Smith, for plaintiffs, relied on Rule 243 (b), providing that plaintiff may deliver a statement of claim with the writ, or at any time afterwards, either before or after appearance, and although defendant may have appeared and stated that he does not require the delivery of a statement of claim.

THE MASTER.—I think the contentions of plaintiffs must prevail. For the success of defendants' argument it would be necessary either that Rule 166 should have said that no statement of claim could be served after appearance without leave of the Court, or that a similar addition should have been made to Rule 247. To hold otherwise would enable a defendant to become practically dominus litis, and prevent a plaintiff from availing himself of Rule 244.

As to the argument that plaintiffs are estopped by filing their affidavit on production, I do not think this is entitled to any weight. All the facts and documents are well known to both parties . . . Nothing would have been gained by delaying production, even in case the order was issued prematurely, which, in my opinion, it was not. . . .

Upon examining the indorsement on the writ of summons and the statement of claim, I think the other objection fails. The only difference is that in the writ credit is given for the Ivey and Blackley mortgages so as to reduce the principal on the original mortgage. The account is then taken for the balance of that mortgage, and afterwards the accounts of the Ivey and Blackley mortgages, the claim being for these three several amounts. In the statement of claim it is alleged that the Ivey and Blackley mortgages were collateral, the defendants joining in them as guarantors. Claim is then made on the original mortgage, credit being given for all payments received on account of the Ivey and Blackley mortgages, the result in both cases being substantially the same. This, in my view, does not exceed the liberty given to the plaintiff by Rule 244.

Motion dismissed with costs to plaintiffs in any event.

BRITTON, J.

DECEMBER 9TH, 1903.

CHAMBERS.

JOHNSTON v. RYCKMAN.

Costs—Taxation—Items—Copy of Correspondence for Brief—Counsel Fees—Partner of Defendant Acting as Counsel.

Appeal by plaintiff from the certificate of the senior taxing officer at Toronto on the taxation of the party and party costs of defendant Ryckman against plaintiff.

The items allowed which were objected to were:

(1) Copy of correspondence between defendant Ryckman and plaintiff, allowed in brief of defendant Ryckman.

(2) Counsel fees where counsel work done by a partner of defendant Ryckman.

W. R. Smyth, for plaintiff.

W. E. Middleton, for defendants.

BRITTON, J.—As to the copy of correspondence which was allowed as part of brief, that is within the discretion of the taxing officer, and I ought not to interfere.

[Budgett v. Budgett, [1895] 1 Ch. 202, referred to.]

This case perhaps differs from Budgett v. Budgett, as the correspondence was not used on the trial. It may have been necessary to brief it for the purpose of cross-examination of plaintiff, or in reasonable anticipation of the correspondence being required and used. Even if not used, the decision arrived at by the senior taxing officer must stand.

As to counsel fees, it was conceded on the argument that Mr. Ryckman would not, on the taxation of costs against the unsuccessful plaintiff, be entitled to counsel fees for himself, had he appeared in person : Clarke v. Creighton, 15 P. R. 105. It was, however, contended that this rule does not apply to a partner of a party to the suit, even if there exists no agreement between the parties to the effect that the one who acts as counsel for the other shall be paid by the other and shall be wholly entitled to the fee, and that the party to the suit shall get no part of such fee.

It is contended that there was an agreement between defendant Ryckman and his partner Mr. Kerr as to Mr. Kerr's work as counsel; such an agreement that the fee paid to Kerr in this case must be taxed in Ryckman's costs against plaintiff. . . .

A counsel fee will not be allowed to a party holding his own brief: Smith v. Graham, 7 U. C. R. 268; Clarke v. Creighton, 15 P. R. 105.

In Henderson v. Comer, 3 U. C. L. J. O. S. 29, Burns, J., decided that "the rule of practice that a person cannot tax a counsel fee in his own case against the opposite party does not extend to his partner." No reasons are given, and it does not appear whether in that case any part of the counsel fee would belong to the party litigant or not, or whether the learned Judge thought that fact of no importance. That decision has not been overruled, but the facts brought out in this case seem to distinguish it.

[Strachan v. Ruttan, 15 P. R. 109, referred to.]

On principle I can see no reason why, if a solicitor in a personal action is entitled to tax and get his costs as solicitor

from an unsuccessful opponent, he should not also get a counsel fee if he acts as counsel. But he cannot do so, and, that being the case, I think it would be wrong to allow a barrister to get for his own use and to his individual profit, through his partner, what he could not get if he had personally acted. . . .

After more than one careful perusal of the affidavits and the cross-examination upon those affidavits, I have come to the conclusion that the agreement, so far as it can be called a concluded agreement between Messrs. Ryckman and Kerr, and their understanding before and at the time Mr. Kerr was acting as counsel for Mr. Ryckman herein, was that he should act and get his pay the same as if acting as counsel for some person other than a member of the firm. That being so, one-half of any proper fee taxable for Mr. Kerr's work as counsel herein would go directly to Mr. Ryckman, and he would thus get, through his partner, for his own benefit, from the plaintiff, what according to the authorities he could not get if he held his own brief and acted as counsel. . . .

I would not, unless compelled by authority, uphold any such conditional agreement as would permit one partner to get the whole fee and retain it for himself, where in the ordinary cause he would be obliged to divide with the other members of the firm. It ought not to be in the power of any firm of barristers to punish a suitor in that way. . . . A counsel fee ought not to be taxed to the partner of such barrister as against the opposite party to a larger amount than the partner so acting as counsel will be entitled to hold for himself and members of the firm, if any, other than the party to the action. . . .

Each counsel fee to Mr. Kerr to be reduced one-half, and as to the amount so taxed Mr. Kerr to be entitled to all subject to any accounting to the partner other than defendant Ryckman.

As the point is in part new, and as the appeal is successful only in part, no costs.

BRITTON. J.

DECEMBER 9TH, 1903.

TRIAL.

SPOTSWOOD, v. SPOTSWOOD.

Will—Devise Subject to Charge—Maintenance of Brother—Enforcement of Charge—Judgment—Terms—Reference—Costs.

Action to enforce a charge upon land devised to defendant subject to the maintenance of plaintiff.

Defendants accepted the land upon the conditions imposed, took possession, and for nine years maintained plaintiff. In 1900 plaintiff and defendant quarrelled, and plaintiff left defendant's house.

J. K. Dowsley, K.C., for plaintiff.

J. A. Hutchinson, K.C., for defendant.

BRITTON, J.— . . . I have come to the conclusion, upon the evidence, that plaintiff should not be required to reside with defendant in his house. It is not in the interest of either plaintiff or defendant that such should be the case.

The plaintiff's care, support, maintenance, and medical attendance, during his natural life, was by the will of Margaret Heenan made a charge upon the land.

Plaintiff is entitled to a reference to ascertain what would be a proper sum to allow for that purpose from 1st July, 1903.

I think the amount paid into Court by defendants is a proper sum to allow for that maintenance from October, 1900, when plaintiff left defendant's house, down to 1st July, 1903, and that sum must be accepted as sufficient to that date, and plaintiff so accepting it, I order payment out of Court to him.

My order as to the sufficiency of the amount paid into Court for maintenance for the period named is not to be taken by the Master as evidence either for plaintiff or defendant as to the sum to be allowed from 1st July, 1903.

Reference to the Master at Brockville to ascertain the proper annual sum to be allowed for plaintiff's maintenance, and to fix a place for payment quarterly after 1st January, 1904.

In case of default in payment of any instalment of the maintenance as directed by the Master for one month, the lands are to be sold with the approbation of the Master, and the proceeds applied in payment of costs and maintenance and arrears of maintenance in the usual way.

Plaintiff is entitled to his costs of the action.

Defendant may, if he desires, offer to pay such amount as he deems sufficient for maintenance, and if such offer is made, the costs of reference will be reserved. If no amount is offered, plaintiff to get costs of reference.

The costs and the amount found for maintenance from 1st July, 1903, to 1st January, 1904, to be paid within one month after the amount is ascertained.

MACMAHON, J.

DECEMBER 9TH, 1903.

TRIAL.

BIGGART v. TOWN OF CLINTON.

Way—Non-repair—Injury to Person—Notice to Municipal Corporation—§ Edw. VII. ch. 18, sec. 130, sub-sec. 5—Failure to Give Notice—Reasonable Excuse.

Action to recover damages for injuries sustained by plaintiff through falling on the sidewalk in Victoria street in the town of Clinton, owing, as alleged, to the negligence of defendants in permitting the sidewalk to be out of repair and in a dangerous condition. The injury was on the 25th April, 1902. No notice of the accident was given to defendants until the 5th July, 1903, when plaintiff consulted a solicitor, who wrote to the clerk of the municipality informing him of the accident.

By 3 Edw. VII. ch. 18, sec. 130, sub-sec. 5 (amending the Municipal Act, R. S. O. 1897 ch. 223, sec. 606) "the want or insufficiency of the notice required under sub-sections 3 and 4 of this section shall not be a bar to an action, except where the action is founded on the existence of snow or ice on the sidewalk, if the Court or Judge before whom the action is tried considers that there is reasonable excuse for the want or insufficiency of such notice, and that the defendants have not thereby been prejudiced in their defence."

W. Proudfoot, K.C., for plaintiff.

E. L. Dickinson, Goderich, for defendants.

MACMAHON, J. (after referring to *Drennan v. City of Kingston*, 23 A. R. 406, 27 S. C. R. 46, and *Armstrong v. Canada Atlantic R. W. Co.*, 4 O. L. R. at p. 568):—One excuse offered by plaintiff for not giving notice was that until she consulted the solicitor on 5th July . . . she was not aware that notice was necessary. And that was the first intimation the corporation had of the accident or of the fact that plaintiff had a claim against them. The other excuse offered by plaintiff was . . . that when her son had fallen some time before and was injured she had gone to the council and got nothing, and she did not "feel like" going to the council again.

There is, in my opinion, no reasonable excuse for the notice not being given. There was not, as in the *Armstrong* case, any notoriety given to the accident which happened to plaintiff, and the corporation had no knowledge of it. And if

mere want of knowledge on the part of the person injured were to constitute sufficient excuse for not giving notice, then the enactment might as well be repealed, as that excuse would be available to almost every person injured.

The action must be dismissed, but I think it is not a case for costs.

MACMAHON, J.

DECEMBER 9TH, 1903.

TRIAL.

WAKEFORD v. LAIRD.

Contract—Master and Servant—Wages—Agreement to Remunerate by Legacy—Quantum Meruit.

Action against executor of William Carson, deceased, to recover wages for services or a share of the estate of deceased.

In 1861, when plaintiff was 12 years old, she went to live with deceased and his wife, who were childless. She was treated as one of the family. She said that when she was 21 she spoke to Carson about leaving, and he said to her that if she stayed on "he would do for me at his death." She remained on with the Carsons till 1878, when she was 29. In 1893 plaintiff returned to Carson's house in the position of a servant, and was paid for her services. Carson died in 1902, leaving a will in which no mention was made of plaintiff.

W. H. B. Spotton, Wiarton, for plaintiff.

E. L. Dickinson, Goderich, for defendant.

MACMAHON, J.— . . . It has been established to my satisfaction that in 1870, when plaintiff reached the age of 21, Carson promised that if she would remain on and work for him he would remunerate her by providing for her by his will. . . . Under this agreement she continued in his service for 8 years, until 1879. And eight years before his death he said to plaintiff, "Jennie, you will get it." He also told John Robinson that he intended leaving plaintiff \$1,000 at his death. . . . Immediately after the execution of his last will Mr. Cook, who drew the will, remarked to the testator that he had left the greater portion of his property to his wife, when the testator replied that she had to provide for Alexander Carson and Jennie Fields (the plaintiff), and the testator's wife, who was present, said to him, "I would rather you would provide for Alexander and Jennie yourself," and testator said to Mr. Cook, "You know they will be well provided for." . . .

After the death of the testator's wife, when he proposed to make another will, he stated that he intended leaving plaintiff a reasonable allowance, as she had worked for him since she was 12 years old. . . .

The testator told Alexander Carson that he intended leaving plaintiff \$1,000, and he thus put a value on the services he considered plaintiff had performed during the 8 years from 1870 to 1878. As payment was not to be made until testator's death, the Statute of Limitations is not a bar.

In *Smith v. McGugan*, 21 A. R. 543, 21 S. C. R. 263, *Murdoch v. West*, 21 S. C. R. 305, *Walker v. Boughner*, 18 O. R. 448, and *Richardson v. Garnett*, 12 Times L. R. 127, the presumption arising from the relationship of the parties that the services performed were to be gratuitous, required to be rebutted. But in the present case no such relationship existed between plaintiff and William Carson, and there is, therefore, no presumption that the services performed by plaintiff between 1870 and 1879 were not to be remunerated by wages.

In *Smith v. McGugan* the Supreme Court held that specific performance of the oral promise made by plaintiff's grandfather to provide for her by will . . . could not be decreed, but that plaintiff was entitled to remuneration for her services for 11 years as on a quantum meruit.

Ridley v. Ridley, 34 Beav. 478, was not cited by counsel in argument, nor is it referred to in the judgment of the Supreme Court, on the question as to specific performance.

On the authority of the cases above referred to, plaintiff is entitled to recover as on a quantum meruit for the 8 years' services performed, and I think a fair sum to allow for such services is \$1,000, being the amount the testator fixed as what he intended leaving.

Judgment for plaintiff for that sum with costs.

OSLER, J.A.

DECEMBER 9TH, 1903.

C.A.—CHAMBERS.

RE CENTRE BRUCE PROVINCIAL ELECTION.

STEWART v. CLARK.

Parliamentary Elections — Controverted Election Petition — Extending Time for Trial—Orders—Discretion—Practice.

Application by petitioner to fix a day for the trial of the petition, and, if necessary, to extend the time for proceeding to trial.

R. A. Grant, for petitioner.

OSLER, J.A.—The petition was filed on the 13th March, 1903. The Legislature was then in session, and did not prorogue until 27th June. There was still time to bring the petition to trial within six months from the filing of the petition, excluding the time of the session, and were the services of the necessary trial Judges certainly available for the purpose, this might now be ordered and notice of trial directed to be given by the Registrar under Rule 27. No application had until now been made by the petitioner to fix the time and place of the trial of the petition, or to extend the time for proceeding to trial, nor had the rota Judges taken the subject into consideration, and the engagements of the Judges during the last half year have been such as would have made it difficult for them to try this and other petitions during that time. The circumstances of this case are on all fours with those of the North Perth, North Norfolk, and North Grey cases, recently before me. According to the well understood and long settled course of practice, it is, under these circumstances, almost as of course that the time for proceeding to trial should be extended under sec. 47 (1) of the Controverted Elections Act. It is true that there was nothing to prevent the petitioner from making an application to the rota Judges to fix the time and place of the trial, but he cannot be said to be in default for not having done so. The obligation and the initiative in that respect are cast upon the rota Judges, the only penalty (if such it can be called) upon the petitioner being that if three months elapse after the presentation of the petition, no day for the trial having been fixed, any elector may on application be substituted for the petitioner, on proper terms: sec. 46. The requirements of justice so plainly demand, in this case, as they did in the others, an extension of the time for proceeding to trial, that I have no more hesitation in exercising in this, than I had in those cases, the discretion given by sec. 47 (1), and extending the time until 31st January, 1904. The course of the Court has been so constant that it would not be necessary to write anything on the subject, were it not in the hope, perhaps a vain one, of obviating the misapprehensions (to use a mild term) which so frequently attend judicial acts in these election cases. The time and place of trial will shortly hereafter be fixed by the rota Judges. Costs of the application to be costs in the cause.

CARTWRIGHT, MASTER.

DECEMBER 10TH, 1903.

CHAMBERS.

BUSMAN. v. CENTRAL TRUSTS CO.

Security for Costs—Plaintiff out of Province—Summary Proceeding to Enforce Mechanic's Lien—Statement of Defence Equivalent to Appearance—Motion before Statement—Undertaking to Defend—Waiver of Objections.

Motions by the several defendants for security for costs. The proceedings were taken under the Mechanics' Lien Act. The statement of claim shewed that the plaintiff resided in New York.

J. W. Bain, for defendants.

Grayson Smith, for plaintiff.

THE MASTER.—It was argued (1) that the motions were premature, because (as was admitted) no defences had been filed; and (2) that in any case the motions were unnecessary, as a præcipe order could have been taken out, if the defendants were entitled to ask for security at this stage.

It was answered that the procedure under the Mechanics' Lien Act was different from that in an action. But sec. 31 (2 and 3) seems to put the statement of defence in the place of the appearance in an ordinary suit; and Rule 1199 gives the right to obtain security only after appearance. And properly so, for, until the defendant has submitted himself to the jurisdiction, it is plainly premature for him to move. Indeed he has no locus standi, and is only a stranger to the proceedings.

There is no reason why the motions should not be dismissed with costs to plaintiff in any event.

Any possible objections that could have been taken to the plaintiff's proceedings on the ground that sec. 13 of 3 Edw. VII. ch. 8 (O.) did not come into operation until 1st December were waived by the undertaking to appear.

CARTWRIGHT, MASTER.

DECEMBER 10TH, 1903.

CHAMBERS.

PHERRILL v. PHERRILL.

Alimony—Interim Order—Refusal of—Defendant without Means.

Motion for interim alimony.

J. M. Godfrey, for plaintiff.

Allan McNab, for defendant.

THE MASTER.— . . The only material before me in support of the motion is plaintiff's affidavit. This states that the allegations in the statement of claim are true, and denies the allegations in the statement of defence. There is no evidence of any kind as to the ability of defendant to pay, if an order is made. On the other hand, the affidavit of defendant states positively that he is unable to pay any sum to plaintiff for alimony" . . . (giving a particular account of his circumstances). This affidavit is not impeached either by cross-examination or affidavits in reply. It must, therefore, be assumed to be true. It would be useless to make an order against a man who has no property on which it could operate.

The motion is refused.

BRITTON, J.

DECEMBER 10TH, 1903.

TRIAL.

McGLEDDERY v. McLELLAN.

Limitation of Actions—Real Property Limitation Act—Possession of Widow of Owner—Oral Agreement for Occupation of Land in Lieu of Dower—Conduct of Parties.

Action for a declaration that the south-west quarter of the west half of lot 26 in the 3rd concession of the township of Eramosa, containing 25 acres, is the property of plaintiff and to vacate the registry of a conveyance thereof from Ellen McLellan to defendant as a cloud on plaintiff's title. Counter-claim for improvements.

D. Guthrie, K.C., and W. R. Riddell, K.C., for plaintiff.

J. J. Drew, Guelph, for defendant.

BRITTON, J.—Plaintiff establishes a clear paper title. One Alexander McGleddery was the owner. He died on 17th June, 1851, intestate, and under the law then in force the oldest son, Samuel McGleddery, became entitled to it as heir-at-law. Samuel, by his will dated 31st December, 1898, devised this land to plaintiff. Samuel died 8th March, 1899.

Alexander McGleddery left his widow Ellen him surviving. She married John McLellan, and defendant is a son by this

second marriage. She went into possession of the land in question about 1863, and remained in possession by her tenants until her death, which occurred 18th October, 1902.

On 23rd June, 1902, Ellen McLellan conveyed this land to her son, the defendant. The conveyance recites that Ellen McLellan was the wife of Alexander McGleddery, and that she had been in actual and undisputed possession of the land since his death. . . .

The question in this case for determination is whether or not Ellen McLellan was in possession under an agreement with her husband's heir-at-law that she should occupy this land during her life in lieu of dower.

It is contended by the defendant that, as the dower of Ellen McLellan was never actually assigned, her possession ripened into a title.

This case is distinguishable from Johnston v. Oliver, 3 O. R. 26, because here there is evidence upon which I can find, and I do find as a fact, that there was an oral agreement between Ellen McLellan and Samuel McGleddery that she should occupy the land in dispute during her life in lieu of dower in the 75 acres which her husband Alexander McGleddery owned at the time of his death. That evidence brings this case within Leech v. Slim, 8 Gr. 494, and Fraser v. Gunn, 27 Gr. 63. . . .

The land in question, as well as the residue of the 75 acres owned by Alexander McGleddery, was in a state of nature at the time of his death and for 12 years after. No claim for dower was made till after the widow's second marriage. . . . J. Fletcher Cross, on 24th March, 1863, . . . made, for her, a formal demand in writing of dower of one-third of the land called the west half of lot 26 . . . It was shewn that Alexander McGleddery owned only 75 acres, of which the 25 acres now claimed was in fact one-third. This demand comes from the custody of . . . the solicitors for Samuel McGleddery, upon whom, no doubt, it was served. From the same custody there comes an unsigned document . . . an acceptance by Ellen McLellan of the 25 acres in question for her use during her life, in lieu of dower in the 75 acres, and a release of any claim of dower in the residue of the 75 acres. . . . Unfortunately the formal document was not signed, but that seems to have been the agreement acted upon. . . .

Judgment for plaintiff as prayed, with costs. Counter-claim dismissed.

DECEMBER 10TH, 1903.

DIVISIONAL COURT.

SLONEMSKY v. FAULKNER.

*Landlord and Tenant—Attornment—Damage to Tenant by
Act of Third Party—Negligence—Liability.*

Appeal by defendant Mirault from judgment of BRITTON, J., (ante 551), in favour of plaintiff in an action tried without a jury at Ottawa, brought to recover damages for injury caused to plaintiff's stock of goods in a store on the corner of Clarence and Dalhousie streets in the city of Ottawa by reason of the flooding of the premises owing to the bursting of the waste pipe upstairs. BRITTON, J., held that for the purposes of the action the defendant Mirault was the person in possession of and in control of the property at the time of the injury; that he knew that the family who had been living upstairs had moved away; and that it was negligence on his part to leave the upper part of the house unprotected, so that the pipe froze and afterwards burst, causing the injury complained of.

The plaintiff cross-appealed seeking to increase the damages from \$300 to \$750.

G. F. Henderson, Ottawa, for defendant Mirault.

M. J. Gorman, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J. (after setting out the facts):—It may be assumed that the plaintiff was in possession of her shop as tenant to the defendant on the 29th December, 1902, when the escape of water occurred, and it is clear that the pipes which are referred to in the statement of claim were part of a system in operation when the plaintiff became tenant, for supplying water from the city waterworks for domestic use throughout the whole building, and it is not questioned that the pipes were sufficient and in good repair, but the liability of the defendant is rested upon the ground that in the circumstances it was his duty to guard against the freezing of the water and the bursting of the pipes, and that he was negligent in the discharge of that duty.

As I understand the law, the owner of a building who lets the separate storeys of it to different tenants is not answerable for an injury caused to one of them by the negligence of another of the tenants in using the appliances for supplying water to the building which are common to all the tenements,

and if he provides and maintains proper appliances for the purpose of the supply, he has fully discharged the duty which he owes to his tenants, and is not answerable for the negligent user of those appliances by a tenant.

Where the landlord is the occupier of an upper storey, he is, no doubt, answerable both for his omission to provide and maintain proper appliances, and for his negligent user of those appliances, and a liability to the same extent also attaches to him on his regaining possession from his tenant, though he does not himself occupy, and he is answerable for suffering to continue any condition created by his former tenant, which he knows or has reasonable cause to believe may occasion injury to his tenants: *Anderson v. Oppenheimer*, 5 Q. B. D. 602; *Blake v. Woolf*, [1898] 2 Q. B. 426; *Mendel v. Fink*, 8 Ill. App. 378; *Green v. Hague*, 10 Ill. App. 598; *Quigley v. Johns Mfg. Co.*, 26 N. Y. App. Div. 434; *Citron v. Bayley*, 36 N. Y. App. Div. 130; *Leonard v. Gunther*, 47 N. Y. App. Div. 194.

The difficulty in this case is in the application of the law to the facts. . . .

My learned brother Britton was of opinion that . . . defendant was answerable for the damages done to the plaintiff's goods.

I am, with great respect, unable to agree in that opinion. Granting that what was done by the defendant was a taking possession of the property as between him and the trust company,—and that I think is by no means clear,—I do not understand how it can be said that he was in possession of the part of the building which was occupied by the Caseys, so as to make him answerable for not taking steps to prevent the water from freezing in the pipes. Assuming that he had a right to dispossess them—and that is by no means clear, I think, as they or some of them were the heirs-at-law of Mrs. Casey—he did not exercise that right, and was not bound to exercise it, and so long as it was not exercised and they were left undisturbed in their possession, they and not he were answerable for the proper user of the appliances for the water supply, and for the consequence of any negligence in the use of them.

What is the negligence which is to be imputed to the defendant? Why should he have anticipated that they would allow the water to freeze in the pipe? The simple expedient of turning off the water would have prevented any danger from the

water freezing. Why should he have anticipated that expedient would not be adopted?

Apart from these considerations, however, I am of opinion that on the 29th December, 1902, when the escape of the water and the damage to the plaintiff occurred, the defendant had not obtained possession from his vendors, the trust company, of that part of the property which the Caseys occupied, and that he did not obtain possession or control of it until after the injury was done to the plaintiff; and if that be the correct view of his position, he is not, of course, answerable for that injury.

The defendant had, no doubt, obtained permission from the trust company to collect the rents due by the occupants of the property, but no authority to dispossess any one who was in possession, certainly not any one who was in possession adversely to the company—and, even if the effect of his collecting rents from such of tenants as chose to pay him had the effect of creating the relation of landlord and tenant between him and them, how can what was done have the effect of casting upon him the obligation of an owner in possession of the part of building which was occupied by the Caseys?

According to the case made and the testimony adduced by the plaintiff, Donovan's tenancy expired at the end of October, 1902. The tenancies of the tenants who held under him also expired at the same time, and no doubt any of the under-tenants who afterwards paid rent to the defendant, became thereby tenants either of the defendant or of the trust company; but, as I have said, the Caseys neither paid rent nor gave up possession, but remained in as they had been before then; and it seems to me therefore to follow that they, and not the defendant, had the possession and control of the upper storey when the wrong of which the plaintiff complains was committed.

In my opinion, the plaintiff's case failed, and her action should have been dismissed, and I would allow the appeal with costs, reverse the judgment appealed from, and substitute for it a judgment dismissing the action with costs.

There is also a cross-appeal by the plaintiff against the amount at which the damages were assessed, but, as the action, in my view, entirely failed, it is unnecessary to say more as to it than that it should be dismissed with costs.

BOYD, C.

DECEMBER 11TH, 1903.

WEEKLY COURT.

CANADA FOUNDRY CO. v. EMMETT.

Contempt of Court—Motion to Commit—Breach of Injunction—Master and Servant—Interference with Servants—Incitement to Commit Breach—Employment of Detective—Offer of Money not Accepted—Failure of Proof—Picketting—Vagueness of Charges—Dismissal of Motion—Costs.

Motion by plaintiffs to commit defendants Atkins and Elliott for breach of an interlocutory injunction.

G. H. Watson, K.C., for plaintiffs.

J. G. O'Donoghue, for defendants.

BOYD, C.—The first breach alleged was that on 22nd October last these defendants did interfere with plaintiffs' employees George Fisher and F. Hodapp and induce and procure or endeavour to induce and procure these employees to break their contracts of employment with or to leave or quit their employment with plaintiffs and paid money to these employees to induce them to quit their employment and leave the city of Toronto, so that plaintiffs should not be able to obtain their services. On this breach the motion should fail, for two reasons. First, the transaction in question was set on foot by a detective or ex-police officer employed by plaintiffs, who laid a plan by which these two men should lay themselves open to the approaches of defendants with a view of inducing the breach of the injunction. These two men were used as decoys to entrap defendants, and, however such methods may be regarded in criminal law, it is not desirable to encourage them in a Court of equity. To get equitable relief one must come into Court with clean hands (according to the old phrase), and a suitor cannot expect the extraordinary power of the Court exercised by way of injunction and committal to be directed in his favour, if he himself procures or promotes the acts complained of. And the second reason is, that upon the evidence of the two employees it does not appear that defendants have been guilty of the offences complained of. Both men say that they had no written contract with plaintiffs—they could leave at any time. Both of them say that they intimated to the two defendants that they had left the employment of plaintiffs and would go away from the city if they could get money to do so, and in this way, by their own statements, they obtained money and tickets to enable them to go

away. One may suspect the reason of all this generosity on the part of defendants, but there is no such proof of overt acts in contravention of this term of the injunction that commitment should follow.

The next alleged breach was that these two defendants did on 9th October interfere with Wallace and Courtney, two other employees of plaintiffs, and endeavoured to procure them to break their contract of employment or to leave the employment of plaintiffs. The matter, as stated by the two employees, consisted in an offer of money (\$20 to Wallace and \$50 to Courtney), and a request that they should stop work and go away from the country. . . . The offer was to have been carried out, as the men say, the same night at seven o'clock, but no meeting took place then, and nothing came of it. It is always difficult to prove an offer of money for improper purposes, and the evidence here is not perhaps in equilibrium, but so nearly even balanced that, after a month's delay in moving, it would not be right to turn the scale against defendants when the result would be imprisonment.

The remaining breach alleged was, that these two and other defendants did on various dates and occasions persistently follow about the plaintiffs' employees and beset and watch the factory, houses, shops, or other places where the men were, with a view to compel them to abstain from service with plaintiffs, and conspired and colluded with each other and their co-defendants to do the like things, etc. . . . This charge is too vague and general to proceed upon in a motion to commit. The matters complained of involve not only civil but criminal liability, and by analogy some such precision should obtain in specifying what is complained of as in an information, or other criminal pleading. I decline to wade through the mass of papers in order to find out what may be the residuum of all the facts, conversations, surmises, and information which has been collected from a host of witnesses. Upon the affidavits a *prima facie* case has not been made out as to any system of picketting with which these two defendants are concerned. The affidavits of the two defendants state that it is not their intention to violate the injunction and that they have not wittingly done so, and, though it would be better that they should abstain from being so much in the company of these workmen who frequent the public houses, they are not called upon to change their habits pending this litigation, because of it.

It cannot be said that the conduct of defendants has not induced the motion, and while it fails because of the grave results involved, it is not a case for costs on either side.

Motion dismissed without costs.

BOYD, C.

DECEMBER 12TH, 1903.

.TRIAL.

LUNDY v. GARDNER.

Principal and Agent—Purchase of Land by Agent—Proof that Purchase Made for Principal—Parol Evidence—Statute of Frauds.

Action to compel the defendants to convey to plaintiff certain land alleged to have been purchased by the defendant for the plaintiff. The defendant pleaded the Statute of Frauds.

BOYD, C., held that the evidence proved that the land was bought by defendant as agent for plaintiff, and that plaintiff continued in possession and improved the land on the faith of that engagement with defendant. He paid interest on the purchase money and obtained receipts. It is competent to prove the agency and purchase for another by parol evidence, notwithstanding the Statute of Frauds. *Bartlett v. Pickersgill*, 1 Cox 15, has been overruled. See *McMillan v. Barton*, 19 A. R. 602; *Barton v. McMillan*, 20 S. C. R. 404; *James v. Smith*, [1891] 1 Ch. 384, 65 L. T. 544; *Re Duke of Marlborough*, [1892] 2 Ch. 133; *Rochefoucauld v. Boudent*, [1897] 1 Ch. 196.

Judgment for plaintiff for a conveyance, on paying the price agreed on and all interest, from which may be deducted plaintiff's costs of this action if he desires.

MACLENNAN, J.A.

DECEMBER 12TH, 1903.

C.A.—CHAMBERS.

RE NORTH PERTH PROVINCIAL ELECTION.

MONTEITH v. BROWN.

Parliamentary Elections—Controverted Election Petition—Motion to Dismiss for Want of Prosecution—Pending Motion to Extend Time for Trial—Refusal of Petitioner to Submit to Examination—Contempt of Court.

Motions by respondent to dismiss the petition for want of prosecution and to commit the petitioner for contempt for refusing to be sworn or examined in support of the first motion, or to compel him to attend for examination at his own expense.

J. P. Mabey, K.C., for respondent.

J. Baird and E. B. Ryckman, for petitioner.

MACLENNAN, J.A., held that the motion to dismiss ought not to have been made and could not succeed while an order extending the time for trial of the petition was in force, even though an appeal from that order was pending. Also, that the petitioner, having obeyed the subpoena and having appeared before the County Court Judge and having respectfully objected to be sworn or examined, on a ground which was well founded, was not guilty of a contempt.

Motions dismissed with costs to petitioner in any event.

MEREDITH, J.

DECEMBER 14TH, 1903.

CHAMBERS.

DWYER v. GARSTIN.

Venue — Change of — Convenience — Cause of Action—Witnesses — Expense — Undertaking — Security — Delay in Moving.

Appeal by plaintiff from order of Master in Chambers (ante 879) changing the venue from London to Toronto, upon defendant undertaking to pay the additional expense of a trial at Toronto and paying \$100 into Court.

R. S. Snellie, for plaintiff.

J. MacGregor, for defendant.

MEREDITH, J., held that plaintiff is still dominus litis, and that his choice of a venue cannot be interfered with except upon substantial grounds. Defendant says he has 8 witnesses at Toronto, and plaintiff says he has 13 at London. It is impossible to say that plaintiff is wrong and defendant is right, plaintiff not having been cross-examined on his affidavit. So the preponderance of convenience, instead of being against London, is in favour of London. There was great delay in making the application, and that is another reason against granting it. It is not proper practice to make a conditional order such as this. The venue should either be changed upon a clear preponderance of convenience, or it should not be changed.

Appeal allowed and motion refused. Costs in the cause.

OSLER, J.A.

DECEMBER 14TH, 1903.

C.A.—CHAMBERS.

RE NORTH NORFOLK PROVINCIAL ELECTION.

Parliamentary Elections—Controverted Election Petition—Extending Time for Trial—Cross-petition.

Motion by the respondent (cross-petitioner) to extend the time for proceeding with the trial of the cross-petition. An order had previously been made extending the time for proceeding to trial on the principal petition, on the usual grounds.

OSLER, J.A., held that the respondent ought to have a similar order in respect of the cross-petition. The petitioner was not in fault for not having moved to have notice of trial given by the Registrar; his opponent was equally blameless in respect of his own petition.

Order made extending time till 31st January, 1904. Costs in the cause.

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CARTWRIGHT, MASTER.

DECEMBER 15TH, 1903.

CHAMBERS.

KELLY v. McBRIDE.

*Life Insurance—Change of Beneficiary—Surrender of Policy
—Issue of Paid-up Policy—Possession of Policy.*

Summary trial of interpleader issue under Rule 1110 to determine who is entitled to a sum of money payable under a policy of insurance on the life of Matthew E. Kelly, deceased.

The policy provided that the sum insured should be paid to "Mary Kelly, mother, or, in the event of her prior death, to Mary Ann McBride, sister, or, if the insured shall survive the aforesaid beneficiaries, to his legal representatives or assigns." Mary Kelly died on the 28th September, 1901, and the insured on the 2nd May, 1903. The policy was a paid-up one for \$500, issued in 1894, in consideration of the surrender of a policy for \$1,000 and a payment of \$148.62. Mary Kelly was the sole beneficiary named in the surrender policy. The \$500 was claimed by Mary Ann McBride and by the executors of the insured, and the insurance company paid the amount, less their costs, into Court.

J. Bicknell, K.C., for Mary Ann McBride.

J. T. Loftus, for the executors.

THE MASTER.—It was argued by Mr. Loftus that the original policy for \$1,000 having named the mother as beneficiary, there was no power to vary this disposition. He cited R. S. O. 1887 ch. 136, sec. 6; 56 Vict. ch. 32, sec. 8 (2); 59 Vict. ch. 45, sec. 1; 60 Vict. ch. 39, secs. 159, 160. I have examined these statutes. They do not seem to me to bear out the argument that in the present case there was no power to change the original policy into one making another beneficiary not of

the preferred class; and that therefore the disposition has failed and the money becomes part of the residuary estate of the insured. It is to be observed that the insured did not assume in any way to exercise control over this policy after his mother's death.

With the first policy, it seems to me, we have nothing to do. If the mother acquiesced in the change, it was clearly for her benefit to get a certainty by means of a paid-up policy. Even if otherwise, it surely cannot be denied that she might either have released her claim to her son or made over her contingent interest to any one else. Either she assented to the change, assuming that her consent was necessary, or she did not. In the first case she had no right to complain. In the second case her rights against the company are not affected. However this may be, it is enough to say that no claim is being made by any one on her behalf.

But I cannot see how the insured was prevented from leaving to his mother, as he did, all the benefit she would have taken under the first policy, and at the same time providing for the case of her decease in his lifetime. See R. S. O. 1897 ch. 203, sec. 151. He has done so, and the evidence of Mrs. McBride makes it very clear why he did so. Her evidence also shews that after the mother's death Mr. Kelly read the policy in question and handed it back to her, saying, "There is \$500 for you." "He sealed it up again and told me that no person could take it from me, as it was mine and would pay me for the trouble I had with mother." . . . In any case possession of the policy would be sufficient to enable her to hold it: see *Rummens v. Hare*. 1 Ex. D. 169.

The money must be paid out to Mrs. McBride, and the plaintiffs must pay the costs, including the costs of payment into Court which were deducted from the \$500.

BRITTON, J.

DECEMBER 15TH, 1903.

WEEKLY COURT.

WENDOVER v. NICHOLSON.

Gift—Parent and Child—Confidential Relationship—Conveyance of Land—Assignment of Mortgage—Action by Administrator of Parent's Estate to Set aside—Imprudence—Lack of Independent Advice—Reference—Account—Inquiries—Statute of Limitations—Costs.

Appeal by plaintiff from report of an official referee to whom the action was referred under R. S. O. 1897 ch. 62, sec. 29.

The action was brought by the daughter and administrator of the estate of Ralph Nicholson, deceased, against her brother Edward Nicholson, to set aside a conveyance to him from his father of land in the district of Muskoka and an assignment from his father to him of a mortgage on land. The conveyance and assignment were both dated 23rd May, 1896, and Ralph Nicholson died on 11th March, 1898, at the age of 82.

The referee found in favour of defendant.

O. M. Arnold, Bracebridge, for plaintiff.

E. E. A. DuVernet, for defendants.

BRITTON, J.—With great respect, I am unable to agree with the learned official referee in his conclusion that the conveyance of the farm and the assignment of the mortgage should stand. If it were merely a question of deciding upon conflicting testimony, I should hesitate before differing from the trial Judge, but it seems to me that upon the undisputed evidence, indeed upon the evidence of defendant himself, he has not satisfied the onus cast upon him of shewing how the transaction can be supported. . . . It appears that as long ago as 1888 defendant stood in a very confidential relation to his father in dealing with his father's money. . . . It was practically conceded on the argument by counsel for defendant that what was done by Ralph was improvident, and if attacked in his lifetime could not have been supported. It gave all he had; there was no power of revocation—no provision for the old man's maintenance in sickness or health, or for his burial. It has been found by the official referee (with which finding I wholly agree) that the conveyance and assignment were prepared and executed without being read over to Ralph and without his having any independent advice.

The defendant in his statement of defence set up that the conveyance and assignment were made for good consideration, viz., labour performed, money and food furnished, and services rendered for 25- or 30 years prior thereto.

I do not think the transaction can be upheld either as a gift or one for adequate consideration.

The only cases I need refer to are: McCaffrey v. McCaffrey, 18 A. R. 599; Waters v. Donnelly, 9 O. R. 391; Fry v. Lane, 40 Ch. D. 312; Beemin v. Knapp, 13 Gr. 398.

The appeal should be allowed, and the conveyance of the land and the assignment of the mortgage should be declared void and be cancelled.

The land must be sold, and the mortgage collected, or mortgage security realized for the estate, and estate wound up by the plaintiff as administrator of Ralph Nicholson. Defendant must account to plaintiff as administratrix for the money of the intestate or of his estate that came to defendant's hands and for the rents and profits of the land since the date of the conveyance. And for the purpose of ascertaining this there should be a reference to the Master at Bracebridge, who upon the inquiry shall ascertain whether defendant is entitled to be paid for any labour performed, money and goods furnished, and services rendered, as set out in paragraph 4 of the statement of defence, and if so, to what amount; and upon such inquiry the defence of the Statute of Limitations, if applicable, shall be available to either party as to any items on either side.

As to costs, as no moral fraud has been proved against defendant, I will follow the course adopted in *Fry v. Lane and Whittell v. Bush*, 40 Ch. D. 324, and not give costs against him. The defendant is to get no costs, but is to bear his own costs except the costs of the day as ordered by Street, J., 10th May, 1901, for the sittings of the Court in May, 1901, at Bracebridge. The plaintiff as administratrix is to be paid her costs, including the costs paid by her to defendant, out of the estate. Costs of reference reserved.

MACMAHON, J.

DECEMBER 15TH, 1903.

WEEKLY COURT.

ORILLIA EXPORT LUMBER CO. v. BURSON.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Assignee—Solicitor for Preferred Creditors—Appointment—Approval—Application to Remove—Injunction—Solicitor for Estate—Partner of Assignee—Debtor of Estate.

Motion by the plaintiffs, creditors of George Wilson & Co., insolvents, for an order for the removal of the defendant from the office of assignee for the insolvents under an assignment for the general benefit of creditors made pursuant to the Assignments Act, and restraining defendant from entering into any contract with any person for the sale or disposal of the assets of the estate of the insolvents, or from settling or admitting the claim of the Quebec Bank as preferred creditors of the estate, or from acting as assignee, upon the grounds that the defendant is a nominee of the bank, and solicitor for the bank; that the defendant's partner, whom he employs as

solicitor for the estate, is a debtor to the estate; that defendant has not managed the estate properly, and has not kept the accounts and so dealt with the estate as an assignee should do, and has acted improperly in selling or attempting to sell part of the assets to the wife of one of the insolvents; and that he has not called upon the secured creditors to value their security.

A fire occurred on the premises of the insolvents on 26th June, 1903, which destroyed a large quantity of lumber and two of the buildings, and after the fire, at an informal meeting of the creditors, the insolvents were requested by the unsecured creditors to make an assignment to Mr. Osler Wade. The insolvents, however, made an assignment to the defendant, the solicitor for the Quebec Bank.

After the assignment, at a formal meeting of the creditors, a motion was made to have one W. G. Wade appointed assignee in place of defendant, but the creditors, by a vote of 49 to 30, confirmed defendant as assignee.

A. C. McMaster, for plaintiffs.

D. L. McCarthy, for defendant.

MACMAHON, J.—. . . Assignments for the general benefit of creditors are frequently made by insolvents to one of their creditors, or to some person named by the creditor; and the general body of creditors, if they object to the assignee, have the remedy in their own hands, for at the first meeting of creditors the majority in number and value may, under sec. 8 (1) of the Assignments Act, substitute another person . . . for such assignee. So that, if it were the fact that the insolvents, at the instance of the Quebec Bank, made the assignment to the solicitor for the bank, that did not prejudice the general body of creditors, for it was in their power to have removed him at the meeting which was called; but, instead of doing so, the majority of the creditors appeared to have confidence in him, for they continued him in the assigneeship.

The assignment being made to the solicitor of the bank cannot of itself be regarded as objectionable, so long as the assignee appoints an independent solicitor to act as solicitor for the estate. This is necessary in order that the duty of the assignee to the creditors may not conflict with his duty as solicitor to the bank.

I do not think the solicitor appointed by the assignee should longer continue to act as such, as he has been solicitor for the insolvents, and is largely indebted to the estate. His duty as solicitor may conflict with his duty as a debtor to the

estate, and with such an adviser the position of the assignee might be no better than if he himself continued to occupy the dual position of solicitor to the bank and assignee to the estate.

The material before me indicates that the bank are fully secured for the indebtedness of the insolvents to them. If this be so, the bank may deem it unnecessary to file a claim against the estate. See *In re Brampton Gas Co.*, 4 O. L. R. 509, 1 O. W. R. 543.

If the bank should settle the claim against the insurance companies so that the rights of the other creditors of the estate are prejudiced thereby, the creditors are not without remedy. Any surplus in the amount legally payable by the insurance companies would, after satisfying the bank's claim, be held by the bank as trustee for the assignee of the estate.

The defendant undertaking to change the solicitor for the estate as indicated, the motion will be enlarged to the trial. Costs to be in the cause to defendant unless otherwise ordered by the trial Judge.

Reference may be had to Story's Equity, sec. 1289; Cas-
sels on Assignments, 3rd ed., p. 50.

DECEMBER 15TH, 1903.

DIVISIONAL COURT.

SASKATCHEWAN LAND AND HOMESTEAD CO. v.
LEADLEY.

SASKATCHEWAN LAND AND HOMESTEAD CO. v.
MOORE.

*Solicitor—Authority to Bring Action in Name of Company—
Determination of Question—Dismissal of Action—Adding
Shareholders as Parties.*

Appeals by the defendants from orders of MEREDITH,
C.J., in Chambers, ante 1075, affirming orders of Master in
Chambers, ante 944.

W. H. Blake, K.C., and A. J. Russell Snow, for appellants.

A. B. Cunningham, Kingston, for plaintiffs.

THE COURT (FALCONBRIDGE, C.J., STREET, J., MERE-
DITH, J.) dismissed the appeals with costs.

DECEMBER 15TH, 1903.

C.A.

WEBB v. CANADIAN GENERAL ELECTRIC CO.

Appeal—Court of Appeal—Order Directing New Trial—Second Trial Taking Place before Appeal Heard—Abandonment of Appeal—Order Quashing.

Appeal by defendants from the order of a Divisional Court (ante 322) setting aside a nonsuit and directing a new trial.

After the appeal had been set down the action came on for a second trial, and judgment was given in favour of plaintiff (ante 865).

Upon the appeal coming on for hearing, W. R. Riddell, K.C., and John Green, Peterborough, for plaintiff, objected to the appeal being heard, the new trial directed by the order appealed against having actually taken place.

E. E. A. DuVernet, for defendants, appellants.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) treated the objection as a motion to quash the appeal, and made an order quashing it without costs.

BRITTON, J.

DECEMBER 16TH, 1903.

CHAMBERS.

JOHNSTON v. RYCKMAN.

Costs—Taxation—Appeal—Items not Objected to before Taxing Officer.

Motion by plaintiff to vary terms of order (ante 1088) upon appeal from certificate of taxing officer.

W. R. Smyth, for plaintiff.

C. W. Kerr, for defendant Ryckman.

BRITTON, J., held that the costs of defendant Ryckman which really pertained to the matter of counsel fees in question on the appeal, should not be paid by plaintiff, but that there was no jurisdiction to interfere as to any items to which objections were not made before the taxing officer, as prescribed by Rules 1182 and 1183: *Snowden v. Huntington*, 12 P. R. 248; *Quay v. Quay*, 11 P. R. 258; *Platt v. Grand Trunk*

R. W. Co., 12 P. R. 273; Cuerrier v. White, 12 P. R. 571. The taxing officer is to make the necessary changes as to counsel fees in accordance with the decision upon the appeal. No costs of this motion. Defendant Ryckman to have two days' time to appeal. Plaintiff to have one day after defendant appeals to cross-appeal.

MACMAHON, J.

DECEMBER 16TH, 1903.

CHAMBERS.

RE MAGER v. CANADIAN TIN PLATE DECORATING CO.

Division Court—Judgment by Default—"Money Demand"—Claim for Money Obtained by False Representations—Prohibition.

Motion by defendants for prohibition to the 1st Division Court in the county of Waterloo and to the bailiff of that Court against proceeding under an execution against defendants, on the ground that the clerk of the Court wrongfully and without jurisdiction entered judgment for default of a dispute notice by defendants, the claim not being for a debt or money demand and not being specially indorsed as required by sec. 113 of the Division Courts Act. The claim was for "money received by defendants for the use of plaintiff, being money obtained from plaintiff by defendants by false representations, \$20, and interest thereon at 5 per cent., 50 cents." Section 113 provides that in actions for recovery of any debt or "money demand," where the particulars of plaintiff's claim with reasonable certainty and detail are indorsed on or attached to the summons, unless defendant leaves a dispute notice with the clerk, final judgment may be entered.

W. E. Middleton, for defendants.

W. Davidson, for plaintiff.

MACMAHON, J., held that the claim of plaintiff was a "money demand," being a demand for money had and received by defendants through an alleged fraudulent representation, and came within sec. 113, and no dispute notice having been left with the clerk, judgment was properly entered after the expiration of the time provided for leaving the same. Addison on Contracts, 10th ed., p. 429, Holt v. Ely, 1 E. & B. 795, Litt v. Martindale, 18 C. B. 314, and Robson v. Eaton, 1 T. R. 62, referred to. Motion dismissed with costs.

ELLIOTT, CO.J.

DECEMBER 15TH, 1903.

TRIAL.

REX v. BURNS.

Criminal Law—Watching and Besetting—Criminal Code, sec. 523 (f)—Obtaining or Communicating Information.

The defendants were charged under sec. 523 (f) of the Criminal Code with watching and besetting the railway station with a view to compel L. & Sons to pay higher wages.

J. Magee, K.C., for the Crown.

J. C. Judd, J. M. McEvoy, and J. G. O'Donoghue, for the several defendants.

Upon the conclusion of the Crown's case, O'Donoghue asked to have the case withdrawn from the jury, upon the ground that the evidence shewed, at most, a watching and besetting to obtain or communicate information, and contended that the absence from the Code of the proviso that, under the English Act, permits watching and besetting merely to obtain or communicate information, made no difference in the law, as the proviso in the English Act was inserted *ex abundanti cautela*.

ELLIOTT, CO.J., allowed the case to go to the jury upon other grounds, but ruled that the absence of the proviso from the Code did not make the Canadian law different from that of England.

CARTWRIGHT, MASTER.

DECEMBER 15TH, 1903.

CHAMBERS.

CLEMENS v. TOWN OF BERLIN.

Jury Notice—Striking out—Action against Municipal Corporation—"Non-repair of Streets"—Obstruction.

Motion by defendants to strike out a jury notice filed by plaintiff. The statement of claim alleged that plaintiff, while driving in the town of Berlin, was injured by the upsetting of his vehicle "owing to a steam road roller unlawfully left standing on the public highway by the defendants."

C. A. Moss, for defendants, contended that the action was for injury "sustained through non-repair" of the street in question, within the meaning of sec. 104 of the Judicature Act.

J. E. Jones, for plaintiff, contra.

THE MASTER gave effect to defendants' contention, referring to *Castor v. Township of Uxbridge*, 39 U. C. R. 113; *Barber v. Toronto R. W. Co.*, 17 P. R. 293; *Atkinson v. City of Chatham*, 26 A. R. 821; *Huffman v. Township of Bayham*, 26 A. R. 514; holding also that it made no difference that the statement of claim did not shew whether defendants themselves placed the roller in the street.

Order made striking out jury notice. Costs to defendants in the cause.

MACMAHON, J.

DECEMBER 17TH, 1903.

TRIAL.

MELICK v. WATT.

Sale of Goods—Action for Price—Condition as to Test—Non-fulfilment—Dismissal of Action—Costs.

Action to recover \$443.63, the price of a gas engine alleged to have been purchased by defendants from plaintiff. The engine was a second-hand one. The defendants were starting a brick yard at Attercliffe station, near Dunnville, and needed an engine to run their brick machine. Plaintiff offered to sell them the machine in question and put it in running order for \$400. Afterwards plaintiff ascertained from one Dashwood, a mechanical engineer at Dunnville, that the cylinder of the engine was broken, and it would be necessary to send for a new one to Philadelphia. Plaintiff then offered to take \$275 for the engine, the defendants to pay for the cylinder and the duty and freight thereon and Dashwood's account for repairs. Defendants agreed to purchase on these terms if, on being tested, the engine was found to be satisfactory for the purpose for which they desired it. A cylinder was procured and repairs made. After several tests at Dunnville, the engine was removed to Attercliffe, and Dashwood went there four times to make tests. On one occasion he got the engine to run the brick machine light, i.e., without any clay being in the machine. But the engine failed to run the brick making machine and the earth-crusher, which was part of the machinery, although the test was made when both were running light. During the last test, which was on 30th September, 1903, the engine did not run satisfactorily even to Dashwood himself, and after that defendants concluded that the engine would not be sufficient for their purposes, and sent it back to Dunnville. The removal of the engine took place on 23rd July, and plaintiff made no claim against defend-

ants until 7th October, after defendants had written a letter stating that the engine was not suitable for the work.

G. Lynch-Staunton, K.C., and W. D. Swayze, Dunnville, for plaintiff.

L. F. Heyd, K.C., and J. F. Macdonald, Dunnville, for defendants.

MACMAHON, J., held upon the evidence that defendants were not liable, and dismissed the action, but, as there was a misunderstanding between Dashwood and defendants as to the arrangement upon which the engine was to be removed and tested, he dismissed it without costs.

DECEMBER 17TH, 1903.

DIVISIONAL COURT.

LINTNER v. LINTNER.

*Husband and Wife—Husband Detaining Wife's Property—
Action of Detinue—Proof of Demand and Refusal—
Evidence of Conversion.*

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of plaintiff in an action of detinue. The plaintiff was the wife of defendant. On 21st October, 1902, she left her husband under circumstances which, according to her contention, entitled her to alimony. When she left, there remained in the dwelling house in which they had lived, and in which the husband continued to live, and on the farm on which the dwelling house was situated, personal property belonging to the wife, consisting of household furniture, etc., and a number of cows and sheep. The claim was for the detention of this property and for pecuniary damages for the detention. At the trial no evidence was given either of a refusal by defendant to deliver the property to plaintiff or of any demand of it by her before action, but plaintiff endeavoured to shew that on 27th November, 1902, after the commencement of the action, there had been a demand and refusal, and contended that this was sufficient to entitle her to recover, upon the authority of *Blackley v. Dooley*, 18 O. R. 381, *Morris v. Pugh*, 3 Burr. 1242, *Wilson v. Girdlestone*, 5 B. & Ald. 847, and *Thorogood v. Robinson*, 6 Q. B. 769.

R. S. Robertson, Stratford, for defendant.

J. P. Mabee, K.C., for plaintiff.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that a demand and refusal on the 27th November, 1902, were not proved. Also that, had the action been for the conversion of plaintiff's property, there was nothing shewn from which the inference that there had been a conversion could properly be drawn, but the proper inference from these facts and circumstances was that there had not been any conversion before action. The action not being for conversion, but for detention, it was open to question whether the rule of evidence referred to was applicable. See *Isaac v. Clark*, Bulstrode 308; *Clements v. Flight*, 16 M. & W. at pp. 46, 47, 50; *Jones v. Dowle*, 9 M. & W. 19; *Needham v. Rawbone*, 6 Q. B. 771 n.; *Wilkinson v. Verity*, L. R. 6 C. P. 206.

Appeal allowed and action dismissed. No costs of appeal or of action. Issue as to ownership of property to be found in favour of plaintiff.

MEREDITH, J.

DECEMBER 18TH, 1903.

CHAMBERS.

WILLIAMS v. HARRISON.

Writ of Summons—Renewal after Expiry—Statute of Limitations—Setting aside ex Parte Order—Material Evidence Withheld.

Appeal by plaintiff from order of Master in Chambers (ante 1061) setting aside order of a local Judge for renewal of a writ of summons after the time for service had expired, and the Statute of Limitations had run in defendants' favour.

C. A. Moss, for plaintiff.

T. P. Galt, for defendant Joseph Harrison.

MEREDITH, J., dismissed the appeal with costs.

MEREDITH, J.

DECEMBER 18TH, 1903.

CHAMBERS.

RE PEINE v. HAMMOND.

Prohibition — Division Court — Verification of Documents—Affidavit of Defendant—Acknowledgments Given for Liquors Drunk in a Tavern—Discrediting Affidavit—Findings of Judge in Inferior Court.

Motion by defendant for prohibition to the 1st Division Court in the county of Middlesex, on the grounds that there

was no evidence of the signature of defendant to the I.O.U.'s and acceptance sued on and produced by plaintiff at the trial of the action other than the affidavit of defendant filed on an application for speedy judgment, and that the affidavit, if evidence at all, shewed that the I.O.U.'s were given for spirituous and malt liquors drunk in a tavern, over which cause of action a Division Court has no jurisdiction, and that the acceptance was paid.

W. H. Bartram, London, for defendant.

H. B. Elliot, London, for plaintiff.

MEREDITH, J.—There is no good reason why the affidavit should not have been put in by plaintiff in support of her case, and if there were, it would not form a ground for prohibition in any case within the jurisdiction of the Court. If there had been no other evidence at the trial, the Division Court ought not to have exercised jurisdiction as to the I.O.U.'s: Division Courts Act, sec. 71, sub-sec. 21. But a witness was examined who gave material indirect evidence in support of the claim, and upon the whole evidence the Judge discredited the allegation as to the consideration for the I.O.U.'s contained in defendant's affidavit, the defendant not being called as a witness in his own behalf. The Judge exercised his judgment, upon the whole evidence, in a case in which, whichever way decided, there would be a good deal that could be said in support of the judgment. There is nothing having a semblance of a perverse finding in order to retain jurisdiction, and whether he was right or wrong in his conclusions, there was no good ground for prohibition. The defendant's course, if desiring to carry the case further, was to have applied for a new trial, so that he might give evidence in his own behalf; his failing to give his evidence at the trial may have weighed much in the Judge's mind in discrediting, in part, his affidavit.

There is no ground for the motion as to the other part of the claim. It was unquestionably within that Division Court's jurisdiction, and whether rightly or wrongly decided is not a question for consideration upon this motion: see *In re Long Point Co. v. Anderson*, 18 A. R. 401.

Motion dismissed with costs.

MEREDITH, J.

NOVEMBER 18TH, 1903.

CHAMBERS.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Pleading—Statement of Claim—Irregularity—Delivery after Notification that Defendant Does not Require—Defence and Counterclaim.

Appeal by defendant from order of Master in Chambers (ante 1087) dismissing defendant's motion to set aside the statement of claim for irregularity.

W. E. Middleton, for defendant.

C. P. Smith, for plaintiffs.

MEREDITH, J.—The Rules are to be so construed as to give effect, if possible, to all of them, and to bring all of their provisions into harmony.

That can substantially be done in this case, though there may be an apparent conflict between the provision giving a defendant power to deliver a statement of defence—treating the indorsement upon the writ as the plaintiff's claim—and the provision allowing a plaintiff three months after appearance to deliver a statement of claim. The harmony is made if the indorsement upon the writ becomes and is the plaintiff's statement of claim. The Rule allowing the three months cannot give a right to deliver a second statement of claim.

That seems to me a fairly satisfactory solution of the main question involved in this motion, and to work out a convenient and satisfactory practice. The plaintiff cannot complain, for, when making his indorsement, he does it with a knowledge that the defendant may treat it as the statement of claim, and it can be framed accordingly, and, after the delivery of the statement of defence, a plaintiff has such wide power of amendment that he can then frame his statement of claim, without any order or leave, in the form it would have taken if the defendant had not elected to treat the indorsement upon the writ as a statement of claim.

That the defendant may thus reduce the usual time allowed to a plaintiff to deliver his statement of claim is not an evil—anything that fairly brings the parties the quicker to

trial and out of litigation, ought to be deemed rather the opposite of an evil. And why should a party have three months or three days or three minutes to do that which he is altogether relieved from doing—in this case to deliver a pleading which he is not required and there is no need to deliver? There is no injustice or inconvenience in this solution of the difficulty. On the other hand, if the learned Master were right, the plaintiff could at his option render entirely futile the provisions of the Rule under which the defence was delivered, and bring about the anomaly, and wasted cost, of a defence duly delivered being rendered wholly ineffectual by the plaintiff choosing needlessly to deliver a statement of claim, instead of doing that which would be just as effectual and would harmonize everything—amend.

Whichever view of the question is taken, some difficulty is met. In this view of it, the plaintiff does not get three months' time to bring forth an unnecessary (having regard to the power to amend) pleading. The words of paragraph (b) of Rule 243 give that right, although the defendant may have appeared and stated that he does not require the delivery of a statement of claim, but not although he may, as the Rules permit and require—in Rule 586—have delivered a statement of defence. On the other hand, if the statement of claim may be delivered notwithstanding the delivery of the statement of defence, a plaintiff can, at his will, deprive a defendant of the right, conferred by Rule 247, in fact turn it into a dead letter, and all done under it into wasted energy and expense, without any substantial reason for the waste. And also some violence is done to Rule 256, which requires a plaintiff to reply, if he desires to reply, within three weeks after the defence has been delivered; and again to Rule 300 as to amending.

The provisions of the Rules in plaintiff's favour are not rendered wholly ineffectual; he may deliver a statement of claim within the three months if no statement of defence is delivered within the eight days, notwithstanding that the appearance may have stated that a statement of claim was not required.

For some purposes the indorsement upon the writ must be considered a pleading; that is made plain by the recent amendment of Rule 300. I would have thought it must always have been so where no other statement of claim was delivered and the defendant had pleaded to it as the plaintiff's statement of claim.

But in truth no very alarming wrong is done whether the one or the other mode of practice is adopted. It is more important to have it settled one way or other. The more convenient and more correct way to settle it is as I have indicated, and, therefore, the appeal will be allowed, and the statement of claim set aside; but all costs of the motion and appeal will be costs in the action, and, if required, the plaintiff's time for replying or amending will be enlarged for three weeks from to-day.

OSLER, J.A.

DECEMBER 18TH, 1903.

CHAMBERS.

GIBSON v. LE TEMPS PUBLISHING CO.

Partnership — Judgment against — Application for Leave to Issue Execution against Partners—Issue—Foreign Judgment—Corporation—Service—Manager of Business.

Appeal by Sara Moffet from an order of MAC TAVISH, local Judge at Ottawa, made on the 10th November, 1903, on the application of the plaintiff for leave to issue execution against Flavien Moffet and Sara Moffet as members of the defendant partnership, on the judgment recovered against the partnership, directing an issue to be tried between Gibson as plaintiff and the Moffets as defendants, the questions to be tried being whether the Moffets were members of the partnership, and whether they were liable to have execution issued against them, or either of them, on the judgment.

The appeal was heard by OSLER, J.A., sitting in Chambers for a Judge of the High Court.

W. H. Barry, Ottawa, for appellant.

D. J. McDougal, Ottawa, for plaintiff.

OSLER, J.A.—The grounds of the appeal shortly stated are: (1) that the judgment sought to be enforced is null and void by reason of there never having been any service of the writ upon the defendants in the action, or upon the Moffets, or the alleged partnership; (2) that the judgment was recovered upon an affidavit which alleges no ground of action against the defendants in the action as a partnership, or

against the Moffets or either of them; (3) that the judgment having been granted improvidently and improperly, and being erroneous, the order applied for should be refused and the judgment vacated, etc.

The proceedings in this action have had a somewhat peculiar course. The action was commenced in the early part of 1902, by writ issued out of the County Court of the county of Carleton. It was removed by order of a local Judge (affirmed on appeal) into the High Court. The writ was specially indorsed with a claim for "\$248.47, the amount due on and under a judgment recovered by the plaintiff against the defendant in the Superior Court in and for the district of Ottawa, in the Province of Québec, on the 4th day of November, 1901," and was served on Flavien V. Moffet, manager of *Le Temps Publishing Company*, but without the notice in writing required by Rule 224 informing him in what capacity he was served. *Le Temps Publishing Company* appeared by the name mentioned in the writ as if sued as a corporation.

A motion for summary judgment was granted on the 4th June, 1902, for the sum claimed in the writ, upon an affidavit of one J. C. Brooke, verifying an exemplification of judgment recovered in Quebec against *La Compagnie de Publication Le Temps*. Against this order and judgment an appeal was taken before Britton, J., which was dismissed on the 7th June, 1902. From his judgment a further appeal was taken to a Divisional Court. Some of the grounds of both appeals were that personal service of process was in Ontario and not in Quebec; and the appearance thereto was involuntary (sic) and defendants should have leave to defend on the merits; (2) that the Court in Quebec had no jurisdiction; (3) the judgment was against public policy, and shews on its face that it treats as a wrong what is not such by our law, etc.; (4) that if the action in the Quebec Court is one for libel, defendants were entitled to notice of action, and the right of action is now barred.

This appeal was dismissed on the 9th September, 1902.

The plaintiff rested until March, 1903, when he obtained an order from Britton, J., to examine one Flavien Moffet as a judgment debtor. An appeal to a Divisional Court from this order was also taken, and dismissed on the 7th April, 1903, with an explanatory variation shewing that Moffet was to be examined as "one of the registered partners of the defendants, otherwise called *La Compagnie de Publication Le Temps*, under Rule 910."

Some of the grounds of objection to the order of Britton, J., were that the defendants were sued as a corporation on a judgment in the Province of Quebec against them as such, and they had appeared in and defended this action as a corporation, and the plaintiff was estopped from denying that they were a corporation and from taking proceedings against them as a partnership, or otherwise than as a corporation.

The next proceeding was that now in question, by which an issue has been directed to try whether the persons appealing are members of the partnership firm of Le Temps Publishing Co.

Several of the objections are similar to those taken on former appeals, and in addition it is contended that service of the writ in the present action having been made upon the manager of the partnership (if defendants are sued as a partnership) and no notice in writing having been then given to him pursuant to Rule 224, informing Flavien V. Moffet whether he was served as a partner or as a person having the control or management of the partnership business, or in both characters, the judgment in the action was irregular or void, etc., and the order in question was made without jurisdiction.

From the affidavits and papers before me on the present appeal, it appears that on the 4th November, 1901, a judgment was recovered in the Superior Court of the district of Ottawa, in Quebec, against certain defendants, sued and described as "La Compagnie de Publication Le Temps, a body politic and corporate, having its principal office and place of business in the city of Ottawa, in the Province of Ontario." The action was for a libel alleged to have been published in the issue of the then defendants' newspaper of the 3rd June, 1901. It was a defended action, but it does not appear whether the quality of the defendants as a corporation was brought in question. A partnership by the name of La Compagnie de Publication Le Temps was registered in the registry office of the city of Ottawa in August, 1900, the partners in which, according to the subscribed declaration, were Flavien Moffet and Sara Moffet, his wife. The partnership was dissolved about January, 1903.

It must be assumed that there is no incorporated company in Ontario of the name of La Compagnie de Publication Le Temps, or its English equivalent, as no affidavit on the subject has been filed, though leave was given to do so. Mrs. Sara Moffet makes an affidavit in which she states that she signed a declaration of co-partnership with her husband about

August, 1900, by the name of La Compagnie de Publication Le Temps. That she never took any part in and knows nothing about the business. That the writ herein never came to her knowledge, and she never knew that she was in any way liable to be proceeded against until served with notice of motion to issue execution against her. That she never authorized any one to take proceedings or to do anything for her in the name of the company; and that she cannot read or speak English.

The objections to the present order resolve themselves into two, namely: (1) that the judgment in this action against the partnership was recovered upon the judgment of a foreign Court against a corporation and not against the partnership firm now sued, in short, that such judgment disclosed no cause of action against a partnership firm; and (2) that the writ in this action having been served upon the manager of the business, and not upon either of the partners, the service was irregular or void because of the omission to serve the notice in writing on the manager informing him in what capacity he was sued, as required by Rule 224.

I have given this matter more consideration than I at first thought was due to it, because on looking through the papers it seemed not improbable that some miscarriage had occurred at an earlier stage of the proceedings. I am, however, quite clear that neither of the objections I have mentioned is open to the defendants on the present motion. It must now be taken that the judgment in this jurisdiction was recovered against a partnership firm, and not against a corporation. I do not know whether the action was intended to be so brought, but it must have been so assumed and held by the Divisional Court when they varied the order of Britton, J., for the examination of Flavien Moffet. The evidence before me is that when the original cause of action in the Quebec suit arose, and when this action was brought, there was a registered partnership firm, the members of which were Flavien Moffet and Sara Moffet, and it has not been shewn that there ever was in truth a corporation of that name in this Province.

If the judgment in the Quebec action is to be regarded as a judgment against a corporation or body corporate, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that is an objection which should have been taken on the motion to enter summary judgment, and it appears not to have been

then taken. This was the substantial ground of defence to the action, and, so far as I can see, it was not brought to the attention of the Court at the proper stage, and has never been decided. A similar difficulty attends the objection as to the service of the writ on the manager. On the motion for judgment it might have been shewn (unless the defendants had done something to waive the objection) that the requirements of Rule 224 had not been complied with, and therefore that there had never been an effective service of the writ upon the firm, the person served not being, in fact, a partner, and not having been informed by the prescribed notice that he was served as manager: *Snow's Annual Practice*, 1902, p. 655; *Yearly Practice*, 1904, p. 504. Or the firm might have moved to set aside the faulty service on the manager: *Nelson v. Pastorino*, 45 L. T. N. S. 564. Neither of these courses was taken, and there is now a judgment against a partnership firm which stands unimpeached, and which cannot be attacked in a collateral proceeding. While it stands the plaintiff has the right to enforce it by means open to him under Rule 228. He cannot proceed under part (1), clauses (b) or (c), because no one who has been served with the writ has appeared in his own name, or has admitted on the pleadings that he is, or has been adjudged to be, a partner, and because there is no one who has been individually, that is personally, served as a partner with the writ and who has failed to appear. He, therefore, proceeds under part (2), and applies for leave to issue execution against *Flavien Moffet* and his wife as being persons other than those mentioned in part (1) (b), (c), who are members of the partnership. As they dispute their liability, the question, not of the validity of the judgment against the firm, but of their liability as members of the firm to execution thereon, is to be determined, which will be done by the issue directed by the order appealed from. I refer to *Ex p. Young*, 19 Ch. D. 124; *Jackson v. Litchfield*, 8 Q. B. D. 474; *Adam v. Townend*, 14 Q. B. D. 103; *Ex p. Ide*, 17 Q. B. D. 753, 758.

The appellants relied upon *Standard Bank v. Frind*, 15 P. R. 438, and *Munster v. Cox*, 10 App. Cas. 680, but those cases are of no assistance to her now. They shew what the practice is up to judgment and afterwards in proceedings against a firm and the persons who compose it, but they do not decide that any irregularity in the mode of obtaining a judgment, regular on its face, against the firm, can be taken advantage of on the motion for leave to issue execution. *Turcotte v. Dansereau*, 27 S. C. R. 583, is a decision on the prac-

tice under the Civil Code, Quebec. While in principle it may be of use to the appellants or one of them on a substantive motion against the judgment, it shews that under the jurisprudence of that Province, as under ours, that is the proper way to attack the judgment.

Whether it may not be still open to Mrs. Sara Moffet, under the circumstances, to obtain relief by a direct motion against the judgment on her own behalf, I cannot say. Flavien Moffet has had and lost more than one opportunity of shewing the facts, and on his second appeal to the Divisional Court the judgment was, as against him, treated as a judgment against the registered partnership firm.

The appeal must be dismissed, and I suppose with costs.

CARTWRIGHT, MASTER.

DECEMBER 19TH, 1903.

CHAMBERS.

BANK OF HAMILTON v. ANDERSON.

Venue—Recovery of Possession of Land—Violation of Rule 529 (c)—Motion to Change—Onus—Fair Trial.

Motion by defendant to change the venue from Hamilton to Milton. The action was to recover possession of land in the county of Halton, and plaintiffs laid the venue at Hamilton, contrary to Rule 529 (c).

G. H. Kilmer, for defendant.

H. L. Drayton, for plaintiffs, contended that the affidavits shewed that a fair trial could not be had in Halton because there were not a dozen persons in the whole county who were not either creditors or friends of creditors of the Anderson estate, and because the public mind had been prejudiced against plaintiffs by the newspapers published or circulated in the county.

THE MASTER held that the onus was on plaintiffs to shew that they were justified in their violation of the Rule, and they had not satisfied it, the affidavits being in direct conflict.

Town of Oakville v. Andrews, 2 O. W. R. 608, Hisey v. Hallman, ib. 403, Baker v. Weldon, ib. 432, Brown v. Hazell, ib. 734, and Unger v. Brennan, 14 P. R. 294, referred to. It is open to plaintiffs to apply to the trial Judge to dispense with the jury.

Order made changing venue to Milton. Costs to defendant in the cause.

CARTWRIGHT, MASTER.

DECEMBER 19TH, 1903.

CHAMBERS.

WALL v. McNAB & CO.

Pleading—Statement of Defence—Denial—Justification—Embarrassment—Master and Servant—Wrongful Dismissal.

Motion by plaintiff to strike out the 2nd and 3rd paragraphs of the statement of defence in an action for wrongful dismissal of plaintiff from the employment of defendants as manager of their dressmaking and mantle departments. The 1st paragraph of the defence denied the allegations of the statement of claim. The 2nd paragraph stated that the plaintiff was employed by the week and paid a salary of \$20 per week and was not entitled to any notice of dismissal. The 3rd paragraph stated that plaintiff was not qualified for the position she undertook to fill and was incompetent to reasonably discharge the duties of such position, and by reason of such incompetency and want of qualification and of misconduct on her part was dismissed.

W. J. O'Neail, for plaintiff, contended that paragraph 1 precluded any reference to the statement of claim so as to interpret paragraphs 2 and 3.

W. A. Lamport, for defendants.

THE MASTER held that there was no possible embarrassment to plaintiff; there was no difficulty in understanding what defendants set up. The only possible ground of objection was the use of the word "misconduct" in paragraph 3. That, however, must be referable to plaintiff's employment:

Smith on Master and Servant, Bl. ed., p. 134. Knowles v. Roberts, 38 Ch. D. at p. 270, Dryden v. Smith, 17 P. R. 512, and Smith v. Boyd, ib. 463, referred to.

Motion dismissed with costs to defendants in the cause.

STREET, J.

DECEMBER 19TH, 1903.

TRIAL.

CROWDER v. SULLIVAN.

Promissory Note — Illegal Consideration — Unreasonable Restraint on Marriage — Mental Incompetency of Maker.

Action upon a promissory note for \$1,500 dated 19th September, 1900, made by Albert Rose, payable three years after date to plaintiff or bearer, with interest at 5 per cent. per annum. Plaintiff was an unmarried woman, and defendant was the administrator of the estate of the maker. The defences were that there was no consideration or an illegal consideration, and that at the time of the making of the note the maker was of unsound mind. Plaintiff was in the service of the deceased as his cook and housekeeper. In 1893 a farmer named Levere paid his addresses to her, and they became engaged to be married, but in the spring of 1897 she broke off the engagement, telling Levere that Rose could not do without her. Rose then told her that if she would not marry and would remain with him as long as he lived he would give her \$1,000 in cash or a note for \$1,500, or would provide for her in his will. She said that it was in consequence of this promise that she broke off her engagement, and he fulfilled it in September, 1900, by giving her the note. In December, 1900, he became suddenly insane, and died in November, 1901. Plaintiff had been hired by the deceased originally at \$8 a month, and her wages were never increased, but were paid to her regularly at that rate. The only consideration for the giving of the note was the agreement made in 1897, viz., that if plaintiff would not marry Levere or any other man so long as Rose lived, but would remain with him during his life, he would do one or other of the three things mentioned. The

deceased at this time was about 60 years of age and apparently in excellent health. Plaintiff was about 28 or 30.

D. B. MacLennan, K.C., and C. H. Cline, Cornwall, for plaintiff.

J. Leitch, K.C., and W. B. Lawson, Chesterville, for defendant.

STREET, J., held that the contract set up was one for an unreasonable period, and the consideration for the note was therefore an illegal one, and no recovery could be had upon it: *Lowe v. Peers*, 4 Burr. 2225; *Hartley v. Rice*, 10 East 22. The issue raised as to the capacity of the deceased at the time the note was made he found in favour of plaintiff.

Action dismissed. Plaintiff to pay general costs of action. Defendant to pay costs of issue found in plaintiff's favour. These costs to be set off pro tanto.

THE
ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING DECEMBER 31ST, 1903.)

VOL. II. TORONTO, DECEMBER 31, 1903. No. 45.

DECEMBER 21ST, 1903.

C.A.

RE NORTH GREY PROVINCIAL ELECTION.

BOYD v. McKAY.

*Parliamentary Elections — Controverted Election Petition —
Order Extending Time for Trial.*

Appeal by A. G. McKay, the respondent, from an order of OSLER, J.A., of 5th November, 1903, whereby the time for the commencement of the trial of the petition was extended until the 31st January, 1904.

J. P. Mabey, K.C., for appellant.

E. B. Ryckman, for respondent.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, MACLAREN, JJ.A., TEETZEL, J.) was delivered by

MOSS, C.J.O.—Upon full consideration of this appeal and a reference to the cases cited and others, we have come to the conclusion that it should be dismissed, for many reasons, some of which were indicated during the argument. We think that the learned Judge had jurisdiction to make the order complained of, and all that was required was that he should be satisfied that the requirements of justice rendered it necessary. No affidavit was called for, under the circumstances, which were quiet apparent to the learned Judge, and could not be disputed by either party. The order was properly made, and is not open to the objections urged against it. The reference in the order, as drawn up and issued, to an affidavit, though erroneous, did not invalidate the order actually

pronounced. If necessary it may be amended in the manner pointed out in the judgment in the North Perth and North Norfolk cases, recently before this Court, ante 1079.

Costs to be costs in the petition.

TEETZEL, J.

DECEMBER 21ST, 1903.

TRIAL.

ATTORNEY-GENERAL FOR ONTARIO v. WYNNE.

Water and Watercourses—River—License to Dam—Patent—Reservation—Interference with Navigation—Crown—Attorney-General—Pond Created by Dam—Easement—Sale of Lands according to Plan—Reservations in Deeds—Injunction to Restrain Obstruction of Pond—Continuous and Apparent Easement.

Action by the Attorney-General and the Trent Valley Woollen Manufacturing Co. for an injunction restraining defendant from proceeding with the construction of a building upon certain land adjoining the property of plaintiff company in the village of Campbellford, and for a mandatory order to remove the building material already placed thereon by defendant.

N. W. Rowell, K.C., George Kerr, and Joseph Montgomery, for plaintiffs.

G. T. Blackstock, K.C., and A. B. Colville, Campbellford, for defendant.

TEETZEL, J. . . . The plaintiff company and the defendant derive their titles under a patent of lot 10 in the 6th concession of the township of Seymour to one David Campbell, dated 25th August, 1852, which contains the following reservation: "Exclusive of the waters of the river front, which are hereby reserved, together with free access to the shores thereof for all vessels, boats, and persons."

On 25th February, 1856, Campbell conveyed the lands to James Cockburn and Nesbitt Kirchoffer (who afterwards signed a declaration of trust of an undivided one-third in favour of Robert Cockburn), and during the same year they constructed a dam across the river Trent where it intersected their property, and shortly afterwards built raceways on either side, connecting with the pond created by their dam.

and made other improvements and additions to utilize their water power. The effect of the dam was to flood their land on either side of the river for a considerable distance above the dam, at a much greater height than it had been naturally.

Until 1869 no express authority had been obtained from the Crown to thus intercept and pen back the waters of the river, but on the 9th December of that year a patent or license was issued to the owners whereby they were authorized to maintain the dam with the works and erections thereto belonging.

I think the effect of this license was to vest in the said parties the use and control of the waters of the river as against the Crown, subject to non-interference with navigation, etc., as therein provided.

If the river Trent was a navigable river—as to which there was no evidence except what might be inferred from the two patents—of course the title to the land in the bed of the river would still be in the Crown: *Attorney-General v. Perry*, 16 C. P. 329. In *Kirchoffer v. Stanbury*, 25 Gr. 413, the late Chancellor Spragge, dealing with this very water privilege, in speaking of the reservation in the original patent, says (p. 416): “Not a very accurate mode of reservation—it would, however, probably operate, though the waters only are reserved, as a reservation of the bed of the river.”

It is not necessary for me to decide this question, as I am satisfied from the evidence that the original bed of the river did not extend as far west as defendant's land. The building proposed by defendant, therefore, not being on the original bed of the river and in no way an interference with the original navigability of the river, nor the free access to the shore, nor upon property ever dedicated, as I find, to the public, the Crown has no interest in this suit, and the defendant has not infringed any public right, and I direct the action, so far as it respects the Attorney-General, to be dismissed with costs, which I fix at \$100, to be paid to defendant by plaintiff company, who were responsible for the action as constituted. . .

On 8th May, 1865, the Cockburns and Kirchoffer caused to be registered “a plan of the water lots south of the bridge and of the river frontage lots north of the bridge in the village of Campbellford, and on 31st December they caused a more detailed plan of said lots to be registered, upon which are indorsed conditions and specifications respecting the enjoyment of water privileges by the lot owners. On both these plans the lands now claimed by defendant, and upon which the building in question is being erected, were shewn as being

submerged by the waters of the river, and on the second plan as being within the area of the pond created by the dam. The lands owned by plaintiff company are shewn on said plan as lots A, B, and 1 to 8, inclusive; and plaintiff company acquired title to all these lands through various conveyances, as the same originally stood in Kirchoffer and the Cockburns.

Robert Cockburn in his lifetime, under deed of partition and otherwise, became the individual owner of lots A (except a small portion off the north-west corner thereof), 4, 5, 7, and 8, also a lot described on the second plan as "store" lot, which adjoined lot A immediately to the north. . . . The first conveyance of this lot, under the subdivision, was that of the 27th December, 1865, a deed from James Cockburn and Kirchoffer to Robert Cockburn, in which it is described as being the "corner lot at the south-west end of said bridge, fronting on George street," lying between George street and the river, and having a frontage of 80 feet on George street towards the west, the northerly limit being Tice street and the bridge, so far as it extends over that parcel, the easterly limit being the river, and the southerly limit being a line drawn parallel with the northerly limit a distance of 80 feet therefrom.

With considerable hesitation, I think this conveyance vested in Robert Cockburn not only that parcel of apparently dry land marked on exhibit 2 as "store" lot which lay between George street on the west and the actual waters of the river, shewn on the plan, but also the land under the water for the width of 80 feet, right to the middle thread of the river, assuming the river to have been non-navigable. . . . *Micklethwaite v. Newlay*, 33 Ch. D. 133; *Massawippi v. Reid*, 33 S. C. R. 457. And assuming the river to have been navigable, the said conveyance would vest in Robert Cockburn the title up to the line of the original bank of the river, which, from the evidence of old residents, was, in my opinion, at least 160 feet east of George street, and a considerable distance beyond defendant's lot.

By deed of 3rd May, 1880, Robert Cockburn conveyed to Dr. Bogart that portion of the lot having a frontage of 80 feet on George street by a depth of 50 feet, the easterly limit being described as "the foundation or easterly wall of the building now upon said parcel," and there is the following at the end of the description—"Reserving the right to the party of the first part, his heirs or assigns, to raise the dam one foot." And, though the deed is not executed by the grantee, it contains the following clause: "The said party of

the second part covenants and agrees to and with the said party of the first part, his heirs and assigns, not to interfere in any way with the water power of the said party of the first part at Campbellford."

Robert Cockburn died in 1894, having made no conveyance of any part between the east wall of the Bogart building and the centre or original bank of the river. In 1895 his representatives sold a strip 20 feet in width, lying to the east of the building, to one Gibson, the then owner thereof, and in the spring of 1896 the defendant made an agreement with the daughter and devisee of Robert Cockburn to purchase for \$150 the land now claimed by him, and during that year entered upon the lot and deposited a quantity of stone, whereupon the plaintiff company served a notice upon him forbidding him making any obstruction whatever in front of their mill property, or in any way interfering with their water privilege, and threatening proceedings.

Nothing further was done . . . by defendant, and he did not obtain the conveyance . . . until 28th December, 1901, when he obtained a quit claim deed, the property therein described being 60 feet by 24 feet, adjoining immediately to the east the 20 feet strip previously conveyed to Gibson. The quit claim deed contains the following reservation: "Reserving thereout the right to raise the dam at Campbellford one foot and subject to all rights of all other parties who have purchased or are interested in any lots on the bank of the river Trent and the water power at Campbellford."

In September, 1903, defendant commenced to build upon this 60 x 24 feet plot, by depositing thereon a quantity of earth and sand to raise the surface above the water, and began to construct a stone wall around the entire lot as the foundation for a store, and before action had built this wall between two and three feet high, and it is in reference to this that the injunction is sought.

When constructing the dam, the proprietors, presumably for the purpose of enlarging the area and capacity of the pond, removed a large quantity of earth down to the rock on the west side from the original natural bank or margin of the river to a point within about 50 feet of George street, and extending from the dam to a point about 70 feet above the bridge, and embracing defendant's lot. This area . . . was not a part of the original river bed, . . . but is now part of the bed of the pond. . . .

After developing their water power scheme, the proprietors sold off various water lots in accordance with the second

plan, and as the result of the partition deed and by purchase there was for a number of years a common ownership in Robert Cockburn of the "store" lot and lot A, which are contiguous.

On 19th February, 1881, Robert Cockburn, by deed under the Short Forms Act, conveyed lot A to A. F. Gault, the plaintiff company's immediate predecessor in title, which deed contained the following: "Subject to all conditions for the support of the dam, raceway, etc., as stated on plan registered and in deed from the original proprietors of the dam to the said Robert Cockburn."

During 1881 and 1882 plaintiff company and Gault expended a large amount of money in erecting woollen mills upon lot A and adjoining lots and in constructing a large raceway across these lots, the westerly side of which, according to the evidence, is only some 17 feet from the south-east corner of defendant's proposed building.

Robert Cockburn was aware of these expenditures and of the construction of the new raceway and of a channel that was blasted from the mouth of the raceway to the bed of the river, and made no objection, and after these expenditures had been made, namely, on the 31st July, 1883, he conveyed to plaintiff company water lots 4, 5, 7, and 8, according to said plan, and subject to the terms and conditions indorsed thereon. . . [Reference to *Bailey v. Clark*, [1902] 1 Ch. 649, and cases cited.]

The manifest scheme and design of the original proprietors was not only to develop a water power system for their own use, but to sell lots on either side as sites for industries, which would use the power on the conditions indorsed on the second plan, and that the pond or reservoir should be tributary or appurtenant to each water lot, and that the land above the dam should, so long as the mill privileges were utilized, be subjected to the flooding as shewn on the plan. It could not, I think, have been contemplated by any person when plaintiff company acquired their titles that this land represented as being flooded would be available for building sites or that the area of the pond should be materially curtailed or used for any other purpose. . . .

It was contended on behalf of plaintiff company that their right to flood defendant's lot in common with the rest of the pond area, as shewn on the second plan, is given by an implied grant, if not an express grant, under the extended scope of the conveyances to them effected by sec. 4 of R. S. O. 1897 ch.

102; that the easement claimed would be embraced within the words of the statute, "privileges, easements, and appurtenances whatsoever to the lands therein comprised belonging or in any wise appertaining or with the same occupied and enjoyed," etc.

Upon a severance of ownership there passes to the grantee by implication of law all those easements over the part retained by the grantor without which the complete enjoyment of the severed portion could not be had, and all these continuous and apparent easements which are necessary to the reasonable enjoyment of the part granted, and which were at the time of the grant used by the owner of the entirety for the benefit of the part granted: see *Opulson & Forbes's Law of Waters*, 2nd ed., pp. 215-227, and cases there cited.

I think the authorities respecting the effect of a conveyance made according to a plan prepared by the vendor are applicable. I take it to be well settled that whenever the owner of a tract of land lays it out into blocks and lots upon a map, and in that map designates certain portions of the land to be used as streets, parks, or in other modes of a general nature calculated to give additional value to the lots delineated thereon—for instance, a mill pond attached to water lots—and then conveys those lots by reference to the map, he becomes bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated: see *Rankin v. Huskeson*, 4 Sim. 15; *Rossin v. Walker*, 6 Gr. 19; *Re Morton and Town of St. Thomas*, 6 A. R. 323; *Sklitzsky v. Cranston*, 22 O. R. 590; *Lenning v. Ocean*, 41 N. J. Eq. 606.

In this case the area indicated on the plan as the pond, from which the water power was drawn, naturally constituted an important, if not the chief, item of value in the water lots; and it seems to me that to permit the vendor or the defendant as his successor to appreciably diminish the capacity or area of this pond as indicated on the plan, would be a derogation of the grants made to the plaintiff company.

But, independently of the effect of the plan, I think the privilege of using the waters of the pond, accompanied by the right to flood the lands of defendant, was such a continuous and apparent easement at the date of the conveyance to plaintiff company, that the title thereto passed to them either by the express words of the conveyances, extended by the statute, or by implication of law. See *Myers v. Catterson*, 43 Ch. D. 470; *Attrill v. Platt*, 10 S. C. R. 425; *Brown v. Alabaster*, 37 Ch. D. 490; *Burrows v. Lang*, [1901] 2 Ch. 502; *Pollard v.*

Gore, [1901] 1 Ch. 834; Gale on Easements, 7th ed., p. 99 et seq.; Hamelin v. Bannerman, [1895] A. C. 237.

It was contended by defendant that, even assuming that plaintiff company had acquired the easement claimed, defendant had a right to make a reasonable use of his land, and that the proposed building was not unreasonable and did not appreciably affect plaintiff company's rights.

I think the evidence established that during a considerable portion of each year defendant's land was entirely flooded, the water ranging from a few inches to 4 feet in depth on the east, and 3 feet on the west side; but at other seasons, during low water, a large portion was dry.

Finding, as I do, that defendant has invaded a legal right of plaintiff company, in the face of warning, and in view of the reservation in their favour contained in his own deed, I do not think I should hesitate to accept the evidence of plaintiffs' witnesses as to injurious effect, rather than the evidence of defendant in support of his effort to have the maxim "de minimis non curat lex" applied.

The evidence in respect of the damage was somewhat conflicting, and consisted chiefly of expert opinion.

I think the weight of it shews that the appropriation and use by defendant exclusively of an area 60 feet by 24 feet, so near the intake of plaintiff company's raceway, will cause appreciable permanent injury to the enjoyment of their property; and I do not think damages would be an adequate compensation, and therefore an injunction should be granted, not only restraining defendant from proceeding with his building, but requiring him to remove the material already deposited, within six months, and that he should pay the costs of plaintiff company, with right to set off the \$100 above awarded.

CARTWRIGHT, MASTER.

DECEMBER 22ND, 1903.

CHAMBERS.

KIRK v. CITY OF TORONTO.

Jury Notice—Action against Municipal Corporation—Non-repair of Street—Judicature Act, sec. 104—Delay in Moving—Costs.

The statement of claim alleged that on 16th May, 1903, plaintiff was injured by negligent use of a steam roller on St. Alban street, in the city of Toronto. The roller was owned

by the defendant city corporation, and was being operated by their men under the direction of the officers of the defendant Dominion Construction and Paving Co.

The cause was at issue before the 8th October, 1903, on which day the plaintiff served a jury notice.

On the 18th December, 1903, the defendants moved to strike out the jury notice as being irregular under sec. 104 of the Judicature Act.

W. C. Chisholm, for the defendant city corporation, and J. E. Jones, for defendant company, relied on *Clemens v. Town of Berlin*, ante 1115, and cases there cited.

C. Nasmith, for plaintiff.

THE MASTER.—The sole question is, does plaintiff sue for injuries sustained through non-repair of the street? I think the question must be answered in the negative, for the following reasons:—

If the present case falls within the section, then it must extend to every accident happening on the streets or roads of a municipality with which their servants are in any way concerned. . . . [Reference to *Hesketh v. City of Toronto*, 25 A. R. 449.]

So far as I can see, this case is not different from that of any other person negligently using a dangerous vehicle, e.g., riding a bicycle or driving an automobile at an excessive rate of speed. . . .

In other words, if the benefit of sec. 104 is invoked, then the “*causa causans*” must be the state of the highway, as in *Clemens v. Town of Berlin* and cases cited. Here it is clearly not so. The condition of the highway was not in any way the cause of the accident. It was the alleged improper and negligent use of it by the servants of the city corporation and the company who were operating the roller. . . .

In *Clemens v. Town of Berlin* the roller was left on the highway, as alleged, when no longer required for use. Here it is negligent management of the steam roller itself which is said to have injured plaintiff. It is just the same in principle as if the machine in question had been in a yard off the street and had been making terrifying noises which caused the runaway in Yonge street that is said to have injured plaintiff.

The servants of the municipality are entitled to the same use of the streets as the rest of the public, with precisely the same duties and liabilities. If by their negligence injury is

caused, the corporation are liable just in the same way as the master is responsible for the negligence of his coachman. . . .

The motion must be dismissed. Considering the long delay, I think the costs should be to plaintiff in any event. See *Phillips v. Beal*, 26 Ch. D. 621. . . .

CARTWRIGHT, MASTER.

DECEMBER 22ND, 1903.

CHAMBERS.

RE LAUGHLIN.

Infant—Legacies—Surrogate Guardian—Payment into Court.

Eliza Laughlin by her will gave legacies of \$100 each to four infants aged 20, 19, 16, and 13 respectively. Both parents of the legatees were dead. A guardian was appointed by the Surrogate Court of the county of Peel on the 12th June, 1896. The security then given, it was admitted, had no reference to these legacies.

The executors applied for an order under the Trustee Relief Act allowing them to pay the legacies into Court.

D. L. McCarthy, for the guardian, contended that the money should be paid to him, citing *Huggins v. Law*, 14 A. R. 383, and *Hanrahan v. Hanrahan*, 19 O. R. 396.

A. McKechnie, Brampton, for the executors, submitted to whatever order might be made, but pointed out the facts as justifying payment into Court.

THE MASTER.—I stated at the argument that my impression, derived from 20 years' service in the Accountant's office, was that the policy of the Court was to have infants' money in Court. I am confirmed in this view by a fresh perusal of the judgment of the Chancellor in *Re J. T. Smith's Trusts*, 18 O. R. 327.

The order will therefore go as asked. Costs of the payment in fixed at \$10, as the amount is small.

There was no suggestion that the money was needed for the maintenance of the infants. Application can always be made if any necessity arises hereafter.

DECEMBER 22ND, 1903.

C.A.

REX v. CALLAGHAN.

Criminal Law—Conviction for Theft—Leave to Appeal—Evidence for Jury—Weight of Evidence—Conduct of Case.

Motion by prisoner for leave to appeal from his conviction for theft at the General Sessions of the Peace for the county of York.

E. E. A. DuVernet and J. A. Macdonald, for the prisoner.

J. R. Cartwright, K.C., and H. H. Dewart, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN. JJ.A.) was delivered by

OSLER, J.A.—It would serve no useful purpose to accede to the prisoner's application. There was evidence on which it was open to the jury to find, if they believed the witnesses for the Crown, that the statutory offence created by sec. 308 of the Criminal Code had been committed. The document which the prisoner relied upon as evidencing that the transaction was one of actual sale to him of the piano was not conclusive of that fact. It was open to explanation quite as much as a receipt is so, and it was proper to shew the circumstances under which it was given and everything else connected with the transaction in order to demonstrate its real character. No estoppel arose out of it. The only parties concerned were the original parties to the dealing, and neither of them had changed his position in consequence of anything stated in the invoice. It might have been very different had the question arisen between a third party and Crossin, and the authorities cited by counsel for the prisoner, *Holton v. Sanson*, 11 C. P. 606, and cases collected in *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 11, pp. 429-431, would have been apt enough in such a case. It is quite clear that the trial Judge could not properly have withdrawn the case from the jury or directed an acquittal. On such a motion as the present the Court has nothing to do with the question whether the verdict was against the weight of evidence. That can only come before the Court on leave granted by the trial Judge. No evidence was improperly rejected or admitted. None at all events was admitted, looking at the case as a whole, which

can be reasonably supposed to have occasioned any substantial wrong or miscarriage: Criminal Code, sec. 746 (f). Statements as to the prisoner's intoxicated condition were perhaps unnecessary, but they were equally unimportant. There is no substantial objection to the Judge's charge, nor is it forbidden to a Judge to comment on the failure either of the Crown or the prisoner to call any particular witness other than the prisoner himself. And as regards the general conduct of the case and isolated observations by either counsel or Judge during the trial, it does not pertain to the Court to express either approval or disapproval, unless they fall within some distinct ground of objection which the Court is authorized under the Code to entertain, or unless they had led to some grave miscarriage. Motion refused.

MACMAHON, J.

DECEMBER 23RD, 1903.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. STRATFORD.

Summary Judgment — Motion for — Action on Covenant in Mortgage—Defence—Denial of Execution and Consideration.

Appeal by plaintiffs from order of Master in Chambers (ante 1060) dismissing plaintiffs' application for summary judgment under Rule 603.

W. M. Douglas, K.C., for plaintiffs.

W. J. Elliott, for defendant.

MACMAHON, J.—. . . The action was brought to recover \$325 and interest under the covenant for payment contained in a mortgage deed. Defendant in an affidavit denied creating a mortgage and denied receiving the \$325. On being cross-examined he admitted that the signature to a mortgage produced was like his, and would not swear it was not his. He said he signed an order (produced) to the plaintiffs to pay Mr. Gilmour \$325, but said he never knew what it was for. In July, 1903, on being notified that proceedings were about to be taken against him by plaintiffs, he admitted his liability, but said he could not pay because he was bankrupt; and he afterwards offered his promissory note for \$50 in settlement. . . . There was a complete admission of liability.

and no triable issue raised. *Jacobs v. Booth's Distillery Co.*, 85 L. T. R. 262, distinguished.

Appeal allowed with costs and judgment for plaintiffs granted with costs.

MACMAHON, J.

DECEMBER 23RD, 1903.

WEEKLY COURT.

RE SAW BILL LAKE GOLD MINING CO.

Company — Winding-up — Preferential Claim for Costs—Fi. Fa. in Sheriff's Hands before Winding-up—Instructions not to Seize.

Appeal by claimants Hazlewood and Whalen and F. H. Keefer from so much of an order of the local Master at Hamilton as disallowed the claim of the appellants for costs, sheriff's fees, and interest, claimed as a preferential lien on the estate of the company. The claimants Hazlewood and Whalen recovered a judgment against the company on 4th October, 1900, for \$400 damages and \$140.21 taxed costs. A writ of fi. fa. goods and lands was issued on 2nd November, 1900, and on 5th November sent to the sheriff of the district of Rainy River, in which the lands of the company were situated. The letter of the claimants' solicitor enclosing the fi. fa. gave the following instructions to the sheriff: "You need not make seizure on the Saw Bill property chattels unless I further advise you, except that the placing of the writ keeps everything in their possession under seizure." On 20th March, 1901, the company made an assignment for the benefit of their creditors, and on 26th March a petition for a winding-up order was presented and the order subsequently obtained. On 1st April the solicitor telegraphed the sheriff to make a seizure, and a seizure under the writ was made by the sheriff about 6th April, and on 4th May, after the winding-up order was obtained, the sheriff withdrew from possession. The claimants were the only creditors who had an execution in the sheriff's hands.

C. A. Moss, for appellants.

A. O'Heir, Hamilton, for liquidator.

E. H. Ambrose, Hamilton, for certain creditors.

MACMAHON, J.—If the claimants had had an execution in the sheriff's hands binding the goods of the company, they

would have had a lien for their costs: Winding-up Act, sec. 66; R. S. O. 1897 ch. 147, sec. 11; and the sheriff would have been bound, on the request of the claimants, to proceed to realize the amount of such costs: *Gillard v. Milligan*, 28 O. R. 645. But the *fi. fa.* did not bind the goods of the Saw Bill Company, as it was not in the hands of the sheriff to be executed, for the sheriff was instructed not to seize until further advised: *Foster v. Smith*, 13 U. C. R. 243; and the sheriff was not advised until after the petition had been presented. and by sec. 7 of the Act the winding-up commences at the presentation.

Appeal dismissed with costs.

DECEMBER 23RD, 1903.

DIVISIONAL COURT.

SEXTON v. PEER.

Parties—Mortgage Action—Death of Plaintiff—Assignment of Portion of Interest—Revivor—Executors—Assignee—Costs.

Appeal by Harold L. Lazier from order of STREET, J. (ante 845) reversing order of Master at Hamilton allowing appellant to continue the action as party plaintiff against the other parties named as defendants. The parties agreed upon the terms of an order to be substituted for that of the local Master except as to costs, which they left to be determined by the Court.

W. E. Middleton, for appellant.

W. S. McBrayne, Hamilton, for respondents.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that the proper order as to costs, under all the circumstances, was that appellant be allowed the same costs, to be added to his claim as mortgagee, as he would have been entitled to if the order now made had been made in the first place upon a proper application in Chambers, and that except as to these costs, each party do pay his own costs of and incidental to both of the appeals.

DECEMBER 23RD, 1903.

DIVISIONAL COURT.

RE ATCHISON, ATCHISON v. HUNTER.

Will—Direction to Executor to Pay Funeral Expenses of Testator's Father—Payment by Executor of Father—Claim against Estate—Motion for Administration Order—Status of Applicant—Beneficiary—Assignee of Claim—Costs—Originating Notice.

Appeal by plaintiff from order of BRITTON, J. (ante 856), dismissing without costs plaintiff's application for an order for the administration of the real and personal estate of John Atchison, deceased.

By the will of the deceased, dated 2nd April, 1901, he bequeathed to his father, James Atchison, who then and at the time of his death resided in Winnipeg, an annuity for life of \$200, and he directed that his executors, upon his father's decease, should convey his remains to and inter them in the family plot in the Presbyterian cemetery at Harwood, in this Province, and have inscribed on his monument erected there a suitable epitaph to his memory.

By an instrument in writing dated 17th July, 1903, James Atchison assigned to the plaintiff all his interest in the estate of the deceased, and directed and authorized the executors of the deceased to pay to the plaintiff "the moneys due by way of annuity under the will or to become due, and the moneys to be (sic) directed under the said will to be applied," for his funeral and burial expenses, and all moneys owing to him in any way whatever.

James Atchison died on the 21st July, 1903, having made his will on the 17th of the same month, by which he appointed the plaintiff executor, and by which he devised and bequeathed everything he possessed to him, especially mentioning the arrears of the annuity and the moneys which were by the deceased's will directed to be paid for his (James Atchison's) funeral and burial expenses.

Probate of this will was granted by the Surrogate Court of the united counties of Northumberland and Durham on 21st August, 1903.

The defendant Hunter, the executor of the will of John Atchison, admitted assets, and the only question in dispute was as to the right of the plaintiff to be reimbursed what he ex-

pended in conveying his testator's body from Winnipeg to Harwood and interring it there, and having the epitaph inscribed on his monument.

The amount claimed was \$225.75, made up of the undertaker's bill at Winnipeg, \$125; the undertaker's bill at Cobourg, \$17.75; the cost of conveying the remains from Winnipeg to Cobourg, \$70; what was paid for digging the grave, \$3; and \$10 for the expenses incurred in having the epitaph inscribed on the tombstone.

No complaint was made by the defendant Hunter of the way in which the funeral arrangements were carried out, except that they were undertaken by the plaintiff without any communication being had with him (defendant Hunter) on the subject, and without his knowledge, and he contended that on this ground he was not liable for them.

F. M. Field, Cobourg, for plaintiff.

C. A. Moss, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J. was delivered by

MEREDITH, C.J.—Having regard to the fact that the deceased lived near Harwood and his father at Winnipeg, it cannot, we think, have been intended that the deceased's executors should undertake the funeral arrangements connected with the father's burial, but what was meant was, that these arrangements should be at the cost of the deceased's estate, leaving them to be undertaken by the executors of the father, upon whom the duty primarily rested. As a matter of taste, it would have been more fitting had the deceased's executor been consulted or at least communicated with, but the omission to take that course ought not to deprive the estate of the father of the benefit which the deceased intended to confer on it. It was a provision for the benefit of the father's estate, because it relieved it from the burden of paying the funeral expenses, which would otherwise have fallen upon it. It appears to be clear that in conveying the father's body from Winnipeg to Harwood and interring it there, the plaintiff intended to conform to the provisions of the will of the deceased, but for which it may well have been that the father's body would have been interred at Winnipeg at very much less expense than was incurred in the burial at Harwood.

It is probable, too, that it was not possible to delay the interment long enough to enable the defendant Hunter, if he desired to do so, to undertake the arrangements for it, unless

he had given instructions by telegraph to some one in Winnipeg, and had he done that, it is unlikely that they would have been carried out otherwise than in the way the plaintiff carried them out, or by any one but him.

Having come to this conclusion, we think that the plaintiff, as representing the estate of the deceased James Atchison, is a beneficiary under the will of the deceased John Atchison, in respect of and entitled to be paid the expenses incurred by him in connexion with the funeral and interment of his testator.

Having regard to the question which was in dispute, it appears to us that the proper course for the plaintiff to have taken was not to have moved for a general administration of the estate of the deceased John Atchison, but by way of originating notice for the determination of that question. The costs of the litigation have been much increased by the course which the plaintiff has taken, and he should be allowed only such costs as he would have been entitled to if he had proceeded by way of originating notice, and the order which we now make had been made on such an application. As to the residue of the costs, each party will pay and bear his own.

The defendant Hunter having admitted assets, the order will be for payment of the \$225.75 claimed by the plaintiff. But, if the defendant Hunter desires it, he may require the plaintiff to vouch the items of his claim, and if he does so that will be done before the Registrar in settling the order. The order will also provide for payment by the defendant Hunter of the costs which we have awarded to the plaintiff.

DECEMBER 23RD, 1903.

DIVISIONAL COURT.

MICKLE v. COLLINS.

Sale of Goods—Contract—Description—Measurement—Rejection—Evidence—Findings.

Appeal by defendant from judgment of junior Judge of County Court of Simcoe in favour of plaintiffs in action in that Court to recover the price of a car load of lumber sold by plaintiffs to defendant.

J. J. Warren, for appellant.

A. E. H. Creswicke, Barrie, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—The contract was for the sale of a car load of 2 x 6 and wider tamarac at \$14 per 1,000 feet, delivered at Severn Bridge f.o.b. the cars there.

A car load of tamarac measuring, according to the contention of plaintiffs, 15,057 feet, was loaded upon a car at Severn Bridge and shipped to the defendant at Toronto on 24th March, 1903.

Upon its arrival in Toronto the defendant refused to receive the lumber, alleging that it did not answer the description of "2 x 6 and wider" tamarac within the meaning of the contract.

It was not disputed by counsel for defendant that the place of delivery was Severn Bridge, and that, unless it was made to appear that the lumber which was shipped to him was of a different character from that which he had purchased, he was not entitled to reject it, but must receive and pay for it and look to the plaintiffs by cross-action or by counterclaim for his damages occasioned by any defect in the quality of the lumber.

The learned junior Judge came to the conclusion, on conflicting testimony, that the lumber shipped answered satisfactorily the description mentioned in the contract, and gave judgment for plaintiffs for the full amount of their claim, reserving to defendant the right to sue for any damage to which he might be entitled for defects in the quality of the lumber.

We agree in that conclusion. Upon the testimony adduced by plaintiffs it was well warranted, and the testimony which defendant produced, while it would, no doubt, if believed in preference to what was opposed to it, shew that a great deal of lumber was defectively manufactured and some of it otherwise defective in quality, fell far short of shewing that defendant had not received substantially that which was the subject of his purchase. There was a good deal of difference of opinion as to what would answer the description "2 x 6 and wider;" the plaintiffs' witnesses testifying that anything which measured one-quarter of an inch above or below two inches would do so; the defendant's witnesses did not agree in that opinion, but all of them who testified on this point admitted that some margin ought to be allowed—though they put it at one-eighth of an inch or less—and the result of the examination of the lumber by Rattan, the first witness called by defendant, was that, in his opinion, 10,886 feet answered the description of "2 x 6 and wider." This witness allowed a margin of one-eighth of an inch, and if the margin

should have been one-quarter of an inch, but a small quantity of the lumber would not have answered the description. We cannot say, therefore, that the learned Judge erred in his findings of fact, and that being our opinion, as he rightly applied the law as enunciated in the authorities to which he referred to the facts as found, the result is that the appeal fails and must be dismissed with costs.

CARTWRIGHT, MASTER.

DECEMBER 24TH, 1903.

CHAMBERS.

MCINTYRE v. COSENS.

Venue—Change of—Grounds—Counterclaim respecting Land—Preponderance of Convenience—Witnesses—Expense—Poverty of Defendant.

Motion by defendant to change venue from St. Thomas to Hamilton.

G. C. Thomson, Hamilton, for defendant.

R. H. McConnell, St. Thomas, for plaintiff.

THE MASTER.—The action was brought to recover certain bank deposit books, cash, household furniture and effects, and other securities for money and other property of the value of \$325 and upwards. These were claimed by plaintiff as executor of one Ellen Milne, who at the time of her death boarded with defendant. The statement of defence alleged that these chattels were given to defendant by the testatrix just before her death by way of donatio mortis causa. Defendant also counterclaimed for a declaration that she was entitled to an undivided one-half interest in the real estate of the testatrix, and for partition or sale. The real estate is situated in the city of St. Thomas. This last fact renders it necessary to refuse the motion. Rule 529 (c) requires an action, which includes a claim for the recovery of land, to be tried at the county town of the county in which the land is situated. If the counterclaim should succeed (though this may be doubtful, in view of *Wakeford v. Laird*, ante 1093, and cases cited, assuming that the alleged promise here, as in that case, was oral only), the reference would naturally be to the Master at St. Thomas. There is no decided preponderance of convenience in favour of the change. The affidavit in support of the motion did not state how many witnesses the defendant would require. The affidavit of plaintiff's solicitor in answer pointed out four that plaintiff

would have. The affidavit in reply (if admissible) alleges that defendant will require seven. This is not sufficient, in view of *Dwyer v. Garstin*, ante 1105, the last decision on this point. The defendant also pleads poverty and that she cannot pay the witness fees of a trial at St. Thomas. There is no authority for giving effect to such a reason.

Motion dismissed. Costs in the cause.

OSLER, J.A.

DECEMBER 24TH, 1903.

CHAMBERS.

RE DELLER.

Will—Construction—Devise to Widow—Condition against Re-marriage—Validity—Absolute Gift—Gift over—Executor.

Motion by executor of will of Gregor Deller (who died on 23rd May, 1886) for directions under R. S. O. ch. 129, sec. 39, and Rule 938. The will was as follows: (1) There shall be paid out of my estate for the chapel on the burying ground at Ste. Agathe in ten years \$50. (2) My wife, née Catharine Kittel, shall have the whole of my estate which remains at my decease, however, with the observation that should she marry again, then she will only receive the third part, and the residue shall be equally divided between my five children, namely 1. Ottillia; 2. Alexander; 3. Emma; 4. Ellora; 5. Maria Anna. (3) I appoint as my executors my friends John Deller and Wendel Kittel, and I empower them to do all things in my name necessary to be done, and I consider it the same as if I had done it myself. (4) I revoke all former wills. Probate was duly granted on 24th February, 1888, to the executors named therein. The affidavit of John Deller, the sole surviving executor, stated that Maria Anna Deller, one of the children of the testator, died on or about the 24th September, 1888, intestate and without issue; that Catharine Deller, the widow, has not married again and claims to be entitled under the will to all the residue of the estate (about \$1,600) remaining after payment of the legacy of \$50 and the debts and funeral and testamentary expenses of the deceased; that the four surviving children of the testator claimed that two-thirds of the said residue should remain in the hands of the executor in order to be paid over to them in case the said Catharine Deller should marry again. It was stated that the property of the testator consisted wholly of realty.

E. P. Flintoft, Waterloo, for executor.

F. Denton, K.C., for widow.

G. R. Geary, for children.

OSLER, J.A.—The words of the second clause of the will are sufficient to create a condition, and such a condition is valid. *Allen v. Jackson*, 1 Ch. D. 399, and *Cowan v. Allen*, 26 S. C. R. 292, 313, referred to. The condition being valid, the true construction of the clause is, that there is an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds of it if she marries again; so that, until this event happens, or if it never happens, no one but the widow can be entitled. Nevertheless, as the event provided against may happen, it follows that the executor cannot safely or properly pay over to her more than one-third of the corpus, and must retain the remaining two-thirds, paying her the income or interest until her death or marriage, when it will fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law. *McCulloch v. McCulloch*, 3 Giff. 606, is much in point. Cases like *Perry v. Merritt*, L. R. 18 Eq. 153, *Lloyd v. Truedale*, [1898] 1 Ir. R. 5, and *Re Jones*, [1898] 1 Ch. 438, have no application except in so far as they tend to support the view that the widow's interest is not a mere life estate in the property devised. They do not deal with the effect of such a condition as that in question. Order declaring accordingly.

STREET, J.

DECEMBER 26TH, 1903.

WEEKLY COURT.

RE GUELPH LINSEED OIL CO.

Company—Winding-up—Appointment of Liquidator—Manager of Business of Principal Creditor—Notice to Shareholders—Sale of Assets—Approval—Completion—Removal of Liquidator.

Motion by David Little, Robert Dowie, and F. T. Coghlan, three shareholders of the company holding \$1,300 each of the stock of the company, to set aside an order made by BRITTON, J., in Chambers, on 13th October, 1903, upon the application of the Traders Bank of Canada, and upon the consent of counsel for the company, appointing Mr. A. F. H. Jones to be liquidator of the company upon his giving security in \$5,000, with power to carry out a sale of the assets of the company to the Dominion Linseed Oil Co. for \$21,000, and to accept stock of that company at par in payment of the purchase money. This order was made at the same time as an

order for the winding-up of the company under the Dominion statute. No notice of either application was given to the shareholders of the company. The paid up capital was about \$32,000, of which the directors held \$22,000 or \$23,000. The only creditors of the company were the Traders Bank, to whom \$33,000 was said to be due, and the solicitors of the company, to whom \$18 was due. With the exception of the three shareholders who were moving, all the shareholders approved what had been done.

F. E. Hodgins, K.C., for the applicants.

D. Guthrie, K.C., and A. B. Aylesworth, K.C, for the bank.

C. A. Moss, for the company and the liquidator.

STREET, J.—Section 20 of the Winding-up Act is express in declaring that the liquidator must be appointed only after such previous notice as shall be prescribed by the Court, and the absence of such notice is a substantial objection to the appointment: *Shoolbred v. Union Fire Ins. Co.*, 14 S. C. R. 624. The objection to Mr. Jones as being manager at Guelph of the Traders Bank is well founded. The bank are practically the sole creditors, and Mr. Jones, as their manager at Guelph when the indebtedness of the company was incurred, must almost necessarily be expected to act entirely in the interests of the bank. The order appointing him liquidator cannot therefore be permitted to stand. He has, however, since his appointment, negotiated a sale to the Dominion Linseed Oil Co. of certain assets of the insolvent company which all parties seem to be satisfied with, and upon which the local Master has reported favourably. The order should be modified so as to declare Mr. Jones provisional liquidator, and to permit him to complete the proposed sale. Reference to local Master at Guelph to appoint some suitable person to be permanent liquidator. It was urged by the bank as an objection to the motion that the object of the applicants was to have a liquidator appointed who would bring an action against the directors and perhaps also against the bank to recover some of the money which the directors are alleged to have lost in speculation with the assistance of the bank, and that the costs of that contemplated litigation, if unsuccessful, will come out of the assets of the company, which practically all belong to the bank. . . . The time has not yet been reached for the discussion of this objection.

Order to be varied as indicated. Costs of all parties out of the estate.

DECEMBER 26TH, 1903.

DIVISIONAL COURT.

LITTLER v. BERLIN ACREAGE CO.

Landlord and Tenant—Action for Rent—Gale Accruing after Action—Counterclaim for Damages to Tenant's Crop—Cattle—Fences—Duty of Tenant Neighbour—Evidence—Leave to Adduce on Appeal.

Appeal by plaintiff from judgment of County Court of Waterloo.

Plaintiff on 10th April, 1902, leased to defendants 32 acres of his farm, consisting of two fields, referred to in the evidence as the "barn field" and the "road field," from that date until the 1st March following, at the rent for the term of \$9 per acre, payable in two equal instalments on the 20th November and December, 1902, respectively.

The lease, which was not under seal, contained an agreement on the part of the defendants to pay the rent, and an agreement on the part of the plaintiff as to the preparation of the land for planting sugar-beet seed, the purpose for which the land was rented by the defendants being the growing of sugar beets on it, but there was nothing said in it as to repairs.

The plaintiff sued to recover the two gales of rent, and his action was begun on 2nd December, 1902, and therefore before the second gale became payable.

By their statement of defence the defendants admitted their liability for the first gale of rent, and they counter-claimed for damages sustained by them owing to the plaintiff's cattle having escaped from his premises and broken into and entered on their fields and trampled down and eaten the crop of sugar beets which was growing in them, whereby the crop was destroyed.

To the counterclaim the plaintiff replied denying the statements contained in it, and alleging that, if his cattle entered the fields, their doing so was due to the negligence of the defendants in not keeping the fences surrounding their lands in a proper state of repair.

At the trial a good deal of evidence was given on the part of the defendants for the purpose of shewing that cattle had done the injury they complained of, and that the offending cattle belonged to the plaintiff. Evidence was also given as to the condition of the fences, and there was a wide difference

of opinion between the witnesses as to the extent of the injury which had been done, the defendants' witnesses estimating the damages at several hundreds of dollars, while those of the plaintiff testified that it was but trifling.

The County Court Judge gave judgment for the plaintiff for \$144 (the amount of the first gale of rent) with interest and without costs, and he found for the defendants on their counterclaim and assessed their damages at \$316.20, and gave them judgment against the plaintiff for so much of that sum as was equal to the amount for which he gave judgment for the plaintiff on his claim, without prejudice to the right of the defendants to proceed to recover the residue of their damages as he had assessed them, as they might be advised.

E. E. A. DuVernet, for plaintiff.

W. M. Douglas, K.C., for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J.—It is not open to question that the disposition made by the Judge of the plaintiff's claim was the right one, for the reasons which he gives, and his judgment on the claim ought therefore to be affirmed.

With regard to the counterclaim, however, as the case stands at present, we are unable to agree with the conclusion of the learned Judge.

We agree that, in the absence of a municipal regulation permitting cattle to run at large, it is the duty of the owner of them to prevent them from trespassing on his neighbour's lands, even though the lands are unfenced, but that duty is, we think, displaced where the neighbour is tenant of his lands to the owner of the cattle, and is under an obligation to fence or to keep up the fences, and the cattle have obtained access to the lands owing to the failure of the tenant to perform that duty.

In this case there was an implied obligation on the part of the defendants as tenants of the plaintiff to keep the fences on the lands demised to them in repair, and also, we think, where there were bars in the fence answering the purpose of a gate, to keep them up, and there is a good deal of testimony which points to the conclusion that if the plaintiff's cattle did the injury complained of, they obtained access to the defendants' "road field," the crop in which was the one damaged by cattle, owing to the bars not having been kept up, and to the defective condition of the fences on the west side of the field. . . .

In order to ascertain the extent of the duty which the defendants owed to the plaintiff as to the repair of the fences or the keeping up of the bars, it is important to know what the nature and condition of the fences and the bars were when the defendants became tenants to the plaintiff of the "road field." The evidence as to this, as it appears in the shorthand notes, is neither clear nor full, and what there is is difficult to understand.

Under these circumstances, we are of opinion that further evidence should be adduced to make clear what the condition of matters in these respects was, unless the defendants have failed to shew that their crop was damaged by the cattle of the plaintiff, in which case the inquiry suggested would be unnecessary.

There is no doubt that some damage was done to the defendants' crop in the "road field" by cattle, and the Judge has found that it was done by the plaintiff's cattle.

As the evidence stands at present, we think it very doubtful whether that conclusion is the proper one. . . .

In strictness perhaps we ought to hold that on the case as it now stands the defendants failed on their counterclaim, but upon the whole we have come to the conclusion that the parties should be permitted to adduce further evidence on this branch of the case.

We do not think that the parties should be put to the expense which would be entailed by sending the case back for a new trial, with the possibility of a second appeal, but that the power which the Court has of receiving further evidence should be exercised, and that the further evidence should be taken at the next High Court jury sittings at Berlin . . . and that the appeal should stand over to be disposed of when the further evidence has been taken, and that the costs of taking the further evidence should be costs in the appeal to the successful party.

The defendants may not take advantage of the leave to adduce further evidence which we give, and if they do not, the appeal as to the counterclaim will be allowed, and, in lieu of the judgment pronounced in respect of it in the Court below, judgment will be entered dismissing the counterclaim with costs, leaving the judgment to stand as a judgment for the plaintiff on his claim for \$144 and interest without costs, and there will be no costs of the appeal to either party.

MEREDITH, J.

DECEMBER 28TH, 1903.

CHAMBERS.

RE CORNYN.

*Infant—Custody—Right of Father—Agreement with Relative
—Interests of Child—Habeas Corpus Application—Costs.*

Motion by William Cornyn, the father of Gladys Cornyn, a girl four years old, on the return of a habeas corpus, for an order for the custody of the child, as against an aunt named Hewson and her husband, who had had charge of the child since February, 1900.

J. E. Jones, for applicant.

C. R. McKeown, Orangeville, for respondents.

MEREDITH, J.—It cannot be found upon the evidence that there was any contract as to the length of time for which the aunt should have the custody of the child. The custody and the affections and the upbringing of the child are the rights and the duty of the parents, not lightly to be interfered with. The charges made by the aunt's children against both the father and mother would have greater weight if there were not the feeling and bias caused by the earnest and bitter fight between the families for the custody of the child to be taken into account, and if these children had not continued to make the home of the father and mother their abiding place whenever visiting Toronto, after all that they now charge is said to have happened. The applicant is entitled to the custody of the child. No order as to costs; the respondents have acted in good faith throughout, and their opposition to the application has been made in the belief that it is entirely in the child's interest.

MEREDITH, J.

DECEMBER 28TH, 1903.

CHAMBERS.

RE ADAMS.

*Distribution of Intestate Estate—Devolution of Estates Act—
—Cousins—Half-blood—Per Stirpes or per Capita—
Double Cousins.*

Motion by the administrator of the estate of an intestate for directions as to the distribution of the estate among the

next of kin. The deceased left no relatives nearer than cousins, some of whom were of the half blood, and one of whom was a "double cousin" of the deceased, that is, a niece of the intestate's father and also of the intestate's mother. The questions raised were whether the cousins were to share per stirpes or per capita, whether those of the half blood were entitled to share, and whether the "double cousin" was entitled to a double share.

J. E. Farewell, K.C., for the administrator.

E. D. Armour, K.C., for Elizabeth Ann Daly.

G. C. Campbell, for Mercer J. Adams and others.

George Bell, for Thomas Bennet and Elizabeth Engle.

MEREDITH, J.—Under the Devolution of Estates Act, all the property in question is to be distributed as personal property is now distributable. And among collateral relatives in the same degree of kinship, it is so distributable equally. They take in their own right, not by way of representation. And there is no question of quantity or quality of blood; those of the half blood take equally with those of the whole blood; and those of the double blood—if such a term is appropriate and applicable—take no more, for all are akin to the intestate, and all in the same degree of kinship.

These observations, applied of course only to such circumstances as those stated in this case, cover all the grounds of this motion, and answer all the substantial questions propounded in it.

Order accordingly, that is, that all parties are entitled equally to the residue of the estate in question. Costs out of the estate, as usual. Payment into Court of the share of the absent party, if desired.

The following among other cases were referred to: *Watts v. Cook*, Show. P. C. 108; *Smith v. Tracy*, 1 Mod. 209; *Lloyd v. Tuck*, 2 Ves. Sen. 714; *Moor v. Botham*, referred to in *Blackborough v. Davis*, 1 P. Wms. 53; *Mercer v. Morland*, 2 Lee Cas. t. H. 499; *Brown v. Wood*, Aleyn 36; *Smith v. Tracy*, 1 Ventr. 523; *Collingwood v. Pace*, 1 Ventr. 424; *Cotton v. Scaranache*, 1 Mad. 45; *Greaves v. Rawley*, 10 Hare 68; *Baker v. Chalfint*, 5 Watts (Pa.) 481; *Gardner v. Colems*, 2 Pet. (U. S.) 87; *In re Watt*, 37 Ch. D. 517; *Gundy v. Punnegas*, 14 Beav. 94.

In *Fredin v. Ashworth*, L. R. 20 Eq. 410, the circumstances, not disclosed in this report of the case, were such that admittedly under the Statute of Distributions the next

of kin would take per stirpes, and the one question was whether they took equally under the words of the will, or per stirpes under the statute. That case obviously affords no assistance in solving any of the questions involved in this case.

STREET, J.

DECEMBER 28TH, 1903.

WEEKLY COURT.

FORBES v. GRIMSBY PUBLIC SCHOOL BOARD.

Public Schools—Requisition to Municipal Council—Money for School Site and Building—Meeting of School Board—Notice Specifying Business—Meeting of Municipal Council—Adjourned Meeting—New Business—By-law—Recital of Debt—Debentures—Payment—Instalments.

Motion by plaintiff for interim injunction restraining the defendants the municipal corporation of the village of Grimsby from issuing or selling the debentures of the village authorized by by-law 179, and from paying to the defendants the school board or any other person any moneys arising from such debentures, and restraining the defendants the school board from receiving any such moneys, and restraining the defendant Van Dyke from authorizing any further work in connexion with the erection of a proposed public school building, and restraining the defendant Lipsit from proceeding with any further work upon the school building. This action was begun on 16th November, 1903, after the refusal on 5th November of an order to continue the injunction granted in a former action (ante 947.) On 11th November, at a meeting of the school board, a new resolution was passed asking the municipal corporation to pass a by-law for the issuing of debentures to the amount of \$12,500 for the purchase of a school site and towards the erection of a school house thereon. This requisition was presented on the same day to the municipal council at a meeting of the council then held, and by-law 179 was passed. There were five members of the school board. All of them were orally notified by the chairman of the meeting to be held on 11th November. Four of them were present, and the fifth, on being notified, stated that it would be impossible for him to attend. None of them objected to the manner of giving the notice.

A. H. Marsh, K.C., and C. H. Pettit, Grimsby, for plaintiff.

G. Lynch-Staunton, K.C., for defendants.

STREET, J.—In the absence of some rule requiring the object of the meeting to be stated in the notice calling it, it is unnecessary that the notice calling any meeting of a school board or municipal corporation should specify the business to be transacted. *Rex v. Pulsford*, 8 B. & C. 350, and *La Compagnie de Mayville v. Whitney*, [1896] 1 Ch. 788, followed. *Marsh v. Synod of Huron*, 27 Gr. 605, and *Cannon v. Toronto Corn Exchange*, 5 A. R. 268, distinguished.

The meeting of the village council held on 11th November was an adjourned meeting from the regular monthly meeting held on 9th November. The adjournment was general, and the business to be transacted at the adjourned meeting was not restricted. The requisition of the school board was sent in in the interval. If this had been the first requisition made by the school board for the sum of \$12,500, it might be open to doubt whether the council could regularly and properly have dealt with it at the adjourned meeting; but the requisition of 11th November was unnecessary and only given as a precaution; the former requisition was sufficient as a basis for by-law 179.

The by-law sufficiently recited the amount of the debt intended to be created; it recited that application had been made by the school board to the council to raise \$12,500 by the issue of debentures, and it proceeded to authorize the issue of debentures to that amount.

Sub-section 1 of sec. 386 of the Municipal Act of 1903 authorizes the issue of debentures providing for the payment of the principal and interest together by equal instalments spread over the whole period for which the debentures are to run, and is alternative to the provisions of sub-sec. 5 of sec. 384.

Application dismissed with costs.

BOYD, C.

DECEMBER 28TH, 1903.

TRIAL.

ELGIN LOAN CO. v. NATIONAL TRUST CO.

Company—Shares—Deposit of Certificates for Safe Keeping—Bailment—Trust—Winding-up of Company Interested in Shares—Appointment of Bailees as Liquidators—Conflict of Interests—Jurisdiction in Winding-up Proceedings—Trustees—Excuse—Relief from Liability—Detinue—Damages—Waiver—Measure of Damages.

An action in the nature of an action for trover and detinue in respect of certificates for 525 shares of Dominion

Coal Company stock and 50 shares of Dominion Iron and Steel Company stock, deposited by the plaintiffs with the defendants for safe keeping. The certificates were put into the name of the defendants for convenience of collecting the coupons. It was an express term of the contract between the parties that the certificates were to be held to the order of plaintiffs and delivered upon demand under proper authority. The defendants, in acknowledgment of the securities, gave plaintiffs a document under corporate seal called "Receipt and Guarantee."

Demands were made for the redelivery of all the scrip on 25th and 30th June and 6th July, 1903, but, default being made, this action was brought on 17th July.

The defendants set up that the scrip was accepted and held by them as trustees, and pleaded that if there was any breach of trust, they should be excused under 62 Vict. (2) ch. 15, sec. 1 (O.) The defendants also pleaded that no damages had accrued to plaintiffs.

It appeared that the Atlas Loan Company were interested in 375 of the shares of Dominion Coal stock deposited with defendants.

The Atlas Loan Company were put into liquidation by winding-up order dated 8th June, 1903, and the defendants were appointed liquidators. A winding-up order was made as to plaintiffs on 22nd June, 1903, and the London and Western Trusts Co. were appointed liquidators. The reference for the winding-up of the Atlas Loan Co. was to the Master in Ordinary, and for the winding-up of plaintiffs to Mr. Hughes, Judge of the County Court of Elgin, as an Official Referee.

G. C. Gibbons, K.C., Shirley Denison, and W. K. Cameron, St. Thomas, for plaintiffs.

S. H. Blake, K.C., and W. H. Blake, K.C., for defendants.

BOYD, C., stated the facts and evidence at length, and found as a fact that no direction was given by the Master in Ordinary in the winding-up of the Atlas Loan Company on or before the 22nd June which in any way protected defendants as custodians of the scrip from handing it over upon the demand made on 25th June. Mr. Hunter, the solicitor for the liquidators of the Atlas Loan Company, said that on the 30th June he obtained the Master's direction not to deliver over to the liquidators of the Elgin Loan Co. the 525 shares of Dominion Coal and the 50 shares of Dominion Steel. The only written evidence of this was an *ex post facto* certificate signed *ex parte* by the Master a week before the trial.

Though an interest on behalf of the Atlas Loan Co. was claimed only in 375 shares, yet it was said the Master directed the whole of the stock to be held, treating all as in the hands of the defendants as liquidators of the Atlas Loan Co., although it was really in their hands as bailees. No claim was made at the trial as to the Atlas Co. having an interest in the securities beyond that pertaining to the 375 shares, and as to them there was no partnership between the two companies, but only an interest of the Atlas Company wiped out by the shrinkage in value of the shares. The Master's ruling appears to have been given at some time, but it is very vague, and would cast upon the liquidator the onus of determining what was included therein. After action, and as a result of a motion therein, an order was made on 11th September, 1903, for the delivery of all the certificates to the Elgin liquidator—the defendants withdrawing all claim to the possession of these certificates, and plaintiffs to hold the same subject to all the equities attaching thereto, and on 12th September they were received by plaintiffs under the terms of that order. This final act of handing over all these securities might have been done with perfect propriety and safety by the depository in response to the first demand. The duty incumbent on the National Trust Company would then have been fulfilled, and the certificates would have passed subject to all the equities into the hands of an officer of the Court—the liquidator of the Elgin Loan Company, the proper custodian. This result, which would have enured to the benefit of all interested, was frustrated by the course pursued by the defendants, which has resulted in great loss from the fall in price of both classes of stock.

I think that a breach of contract on the part of the defendants is clearly proved by their own letter of 26th June, when the stock might have been delivered in due execution of the contract to the Elgin Company, instead of being withheld in order to seek the intervention of the officer charged with the liquidation of the Atlas Company.

Now, one main line of defence is, that the defendants are trustees to be protected under the provisions of the Act already referred to. And the case of *In re Tilsonburgh, Lake Erie, and Pacific R. W. Co.*, 24 A. R. 378, is relied on to shew that the relation between the Elgin Company and the defendants was that of trusteeship. That was a clear case of property being held in trust for the benefit of another upon certain conditions being complied with. There existed the three conditions usually to be found in trust transactions, i.e., the creator of the trust, the trustee of the property, and the

cestui que trust to be benefited by the creation of the trust. Here there is no cestui que trust in the ordinary sense, unless that term can be applied to the bailor of the scrip certificates. There were no duties to be performed by the defendants except to collect the coupons and transmit the money to the Elgin Company, and to hold safely the scrip till its return was demanded. That rested on the terms of the contract, and not upon equitable obligations of fiduciary import.

The chief instrument between the parties was for the sole benefit of the Elgin Company as bailors, and the National Trust Company came in as a paid depository to take custody and care of the securities for the owners.

Though the word "trust" is used in some of the letters, the word "agent" used in others is more pertinent. As said by Lord O'Hogan in *Kinloch v. Secretary of State*, 7 App. Cas. 620, there is no magic in the word "trust," and, except in the name of the defendants, the word is not used in the "Receipt and Guarantee" which manifests the transaction. Regard must be had to the nature of the transaction and the terms of the instrument relating thereto in order to determine whether the grantor, donor, settlor, or bailor intends to create a trust for the benefit of another (cestui que trust) or merely to arrange for the disposal of property to suit his own convenience by giving some revocable direction to the transferee of the property. In the one case the instrument is one of trust properly speaking, one in which we find the three parties, the owner—the maker of the instrument—transferring property to a trustee for the advantage of the beneficiaries; in the other case the owner gives directions to an agent for his own convenience, with express or implied power at any time to countermand the directions and recall the property: *New Oram Co. v. Homfray*, [1897] 1 Q. B. 607, and S. C., in appeal, 2 Q. B. 24 and 30; *Johns v. James*, 8 Ch. D. 744, 749; *Alexander v. Wellington*, 2 R. & M. 60.

Even if a trust proper has been created, yet where the property is in the hands of the trustee merely for the benefit of the settlor himself, he can at any time revoke such trust, and call upon the trustee for a reconveyance to himself: *Strong, J., in Poirier v. Brulé*, 20 S. C. R. 97, 102.

I have a strong impression that this bailment for the sole advantage of the bailor is not such a trust as is contemplated by the statute of 1890. And this view is strengthened when the property deposited has been recalled by the bailor and the depository withholds in wrongful detention that which he should at once transmit to the owner from whom he received it. The relation of trust, if it existed, has been revoked, and

the depositary acting in plain violation of the terms of the contract cannot invoke the aid of the Act relating to trustees. The law has already provided for a case of this kind, where a claim is made upon the property or an adverse interest alleged to exist therein, by permitting the bailee to interplead: *Biddle v. Bond*, 6 B. & S. 225. It would seem undesirable to extend the law of trusteeship to these dealings of commercial and financial import, where the law has settled into definite lines of responsibility and relief.

But I would further deal with the case on the assumption that it was a trust transaction, and that "fiduciary responsibility" within the meaning of the statute still existed after the demand made for the return of the property on 25th June.

Did the defendants as trustees (by this hypothesis) "act honestly and reasonably and ought they fairly to be excused for the breach"—using the language of the statute? Now, the radical difficulty I find in the case is that, owing to the dual character of the defendants, it became impossible for them to act with singleness of purpose, and the obligations of the trustee became obscured by the zeal of the liquidator. The course was clear to hand over the securities after the first demand, but, instead of this, delay arises from matters suggested by the custodian, the solution of which is not essential to his safety (see *Dewey v. Thornton*, 9 Ha. 232.)

Misconception appears to have existed from the outset as to the scope of the liquidation under the Atlas Company winding-up order. Mr. Home Smith's first concern was to prevent the collateral securities held by creditors of the Atlas from being sold, and later this took the shape of preventing them being sold without the concurrence and intervention of the liquidator of the Atlas to the end that the proceeds might be administered in that liquidation. The directions given by the Master were with this intent, and the action thus taken must have proceeded upon a misapprehension of the real and true state of the case: *Re Brampton Gas Co.*, 4 O. L. R. 509. These securities belonged to the Elgin Company, and it was optional with that company to prove in the Atlas liquidation and upon proof to bring in and value their securities or to stand aloof and sell their securities as they might think best.

There is no jurisdiction under the Winding-up Act, sec. 39 (cited to support the direction) to deal with assets which are not in the hands, possession, or custody of the liquidator. These securities were owned by the Elgin Company and were temporarily deposited for a purpose with the National Trust Company as agents or trustees of the owners, and could by no

possibility pass to or become vested in the National Trust Company as liquidators as a result of the winding-up order. Yet upon no other theory can the Master's direction as a whole be supported. Upon a representation that the Atlas Loan Company was interested in all this stock he may have given a direction which must be limited to the 375 shares; but even as to these the facts before him, or which should have been made known to him, disclose no real interest. All that it amounted to was a security held by the Elgin Company derived from the Atlas Company, which fell far short of paying the unquestioned debt, and was of precarious and fluctuating value owing to the state of the stock market.

The mandate of a Court without jurisdiction affords no protection or defence, and it may well be accounted a thing of nought, as was said in *McLeod v. Noble*. 28 O. R. 528.

These considerations indicate that the course pursued quoad the real owners was not a reasonable one, and that it would be unfair to exonerate the defendants from all legal consequences resulting from their detention of the certificates.

In brief: under the Trustee Act the advice of competent counsel and the opinion of the Court, even if erroneous, may afford sufficient protection to the honest trustee. But in this case there was no independent counsel sought, simply reliance on what was done and directed by the solicitor for the liquidator, which cannot be regarded as proper advice for the guidance of the trustee: *Chapin v. Brown*, [1902] 1 Ch. at p. 805. The breach complained of is not so much in administration of the alleged trust as in contravention of the terms of the contractual obligation, and the intervention of the Official Referee in the liquidation of the Atlas Loan Company was *ex parte* and without jurisdiction as regards the Elgin Loan Company and its liquidation.

So one is shut up to the conclusion that the defence fails on the excuse, and it remains to ascertain the amount of damages recoverable for the illegal detention.

The defendants set up in mitigation or extinction of damages various offers and propositions made which were not accepted by the plaintiffs. The first is on or about the 30th June, to this effect: if Mr. Moore considered it advisable that the securities should be sold, the defendants as liquidator would join in an application to the Master for an order permitting the sale, and that the money resulting from sale should be held by the National Trust Company as liquidator of the Atlas Loan until the rights of the parties were determined. (See affidavit of R. H. Smith, paragraph 6, sworn 23rd July, 1903.)

Again on 4th July a letter was written suggesting that if a full statement of facts was made by the liquidator of the Elgin Loan Company, the matter could be laid before the Master in Ordinary and an arrangement satisfactory to all parties would be likely to result. (Same affidavit, paragraph 7.)

Both these offers were before action, and proposed that the Elgin Loan Company should, as it were, attorn to the jurisdiction of the Court charged with the Atlas liquidation, and that sale and proceeds should abide the result of what might be determined therein. The attitude of the plaintiffs was that they required an unconditional redelivery of the certificates to the end that they might be able to realize and apply the proceeds to pay a dividend in the Elgin liquidation, and had this delivery been made it is said that the Elgin depositors would have been before this time paid in full.

After action brought, like offers to sell and bring the proceeds into Court under the Atlas liquidation were made by letters, set forth in the defence, dated 23rd July, 1903, and 28th July, the latter being based on one term in an order made upon consent in this action on application to stay proceedings. That term was thus expressed: "Upon the plaintiffs and the liquidators of the Atlas Company agreeing to do so they shall be at liberty to join in the sale of the stock, and the proceeds thereof to be held pending the disposition of this action by the defendants in the same manner and subject to the same trusts and conditions as the stock is now held under."

No sale was agreed upon, and next came the final order of 11th September, under which all the securities were handed over unconditionally to the plaintiffs—the defendants relinquishing claim to the possession.

Now, in cases of detainee, where delivery is made pending action, damages for the unlawful detention are properly given based on estimates of what has been lost by the detention.

The offers from 30th June up to and inclusive of that on 23rd July contemplated sale and liquidation of the proceeds in the Atlas Company winding-up. The plaintiffs were entirely right in refusing to recognize any jurisdiction in that forum, and were justified in declining to attorn to that Court.

The conditions attached to those various offers were such as to nullify their effect. But other considerations arise in regard to the consent order of 28th July and the letter which followed of the 30th July, shewing the willingness of the Atlas liquidator to join in the proposed sale; on that the money would have come into the hands of the defendants as

trustees and have been dealt with in the progress of this action. There is no valid or other reason assigned for the refusal of the Elgin liquidator to join in that sale as proposed in the consent order, and I think that the failure to realize the value of the securities at that date is attributable to the unwillingness of the Atlas liquidator to sell at the current prices. It appears to me that the wrongful detention, so far as damages are concerned, ceased at that time, say 30th or 31st July, 1903: *Serrao v. Noel*, 15 Q. B. D. 549.

As to measure of damages the cases shew that in cases of wrongdoing, such as this is found to be, where there is from the time of the demand a continuous obligation to restore the property to the owners, it is not unreasonable to take the highest price of the thing between the demand and the delivery: *Michael v. Hart*, [1901] 2 K. B. 867, and in appeal [1902] 1 K. B. at p. 488. as contrasted with *Mansell v. British Linen Co. Bank*, [1892] 3 Ch. 159, 163.

The evidence shews that the plaintiffs were minded to sell the Coal stock when it went above par (p. 19). This it did, and realized its highest point (between 25th June and 31st July) on 9th July, when it went up to 109 at Montreal and 108 at Toronto. The letter of 23rd intimates that it might be sold at 93. That was about the rate on that day, but it dropped on the next. Looking at all the figures, I think it could easily have been sold on 7th, 8th, and 9th July at 105. and this I take to be a fair figure, so that on the Coal scrip the damages would be the difference between 93 and 105, or 12 points for 525 shares, equals \$6,300.

As to the other stock, the Iron and Steel, this reached the highest point (within the given limits) on 8th July, then sold at 60; but at the end of July it had fallen to 40 and 42. I should say the proper damage is the difference between 58 and 42. i.e., 16 points; that on 50 shares equals \$800. Interest should also be paid by the defendants on the amount of dividends collected from the time of receipt till time of payment over to plaintiffs, and the costs of the litigation.

The Registrar may compute the amount of interest and insert in the judgment.

DECEMBER 28TH, 1903.

DIVISIONAL COURT.

GARNER v. TOWNSHIP OF STAMFORD.

Evidence—Cause of Death—Way—Non-repair—Negligence—Fatal Accidents Act—Statement of Deceased—Narrative of Event — Rejection — Other Evidence — Sufficiency of to Establish Liability—Municipal Corporations—Joint Liability.

Plaintiffs, husband and wife, sued under Lord Campbell's Act to recover from defendants, the municipal corporations of the township of Stamford and village of Niagara Falls, damages for the death of their daughter, caused, as they alleged, by the negligence of defendants. The daughter died of peritonitis apparently caused by an injury which she received by falling over a stone in a footpath which she was lawfully walking upon. The action was tried before MACMAHON, J., without a jury. Evidence was admitted subject to objection of statements made by the deceased as to the cause of her injury, but the trial Judge excluded it from his consideration, and dismissed the action. The plaintiffs appealed.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

C. A. Masten and F. C. McBurney, Niagara Falls, for plaintiffs.

F. W. Hill, Niagara Falls, for defendant village corporation.

F. W. Griffiths, Niagara Falls, for defendant township corporation.

STREET, J.—. . . In *Regina v. MacMahon*, 18 O. R. 502, . . . the question of the admissibility of the statements of a deceased person as part of the *res gestæ* was fully discussed. The effect of that decision . . . is to exclude everything offered in evidence as part of the *res gestæ* which is found to be a mere narrative of the event in question after it has happened. All the statements of the deceased offered in evidence here, and received subject to objection, but subsequently excluded by the trial Judge from his consideration, plainly consist of narrative . . . easily distinguishable from those involuntary and contemporaneous exclamations and statements made without time for reflection which are the

only class of statements properly admissible as part of the *res gestae*. . . . These statements were not properly admitted, and they should not be considered in coming to a conclusion as to plaintiffs' rights.

Excluding them, however, I am of opinion that there remains a body of evidence upon which we may properly find in favour of plaintiffs.

We have, in the first place, uncontradicted evidence of the existence of a dangerous nuisance upon the footpath, for which defendants are responsible. Then it is shewn that deceased left Mr. Biggar's house in good health on the evening in question, and was at Mr. Garner's house a few minutes later suffering great pain. On the same evening, at an hour which must have been very close to that at which the deceased would pass the stone, a young woman answering the description of the deceased is found by Mr. Hapgood lying across the stone in question suffering great pain. The doctor who attended the deceased the same night found her suffering from injuries which might have been caused by a fall upon the stone in question; and the injuries she had received caused her death. I think there was here evidence which could not have been withdrawn from a jury in support of plaintiffs' case, and upon which, in my opinion, we should find for plaintiffs: *Fenna v. Clare*, [1895] 1 Q. B. 199.

The judgment entered for defendants should, therefore, in my opinion, be set aside, and there should be judgment for plaintiffs for \$1,000, divided as the learned trial Judge suggested, that is to say, \$700 to the father and \$300 to the mother, and the costs of the action and of this appeal.

The defendants are made jointly liable by sec. 610 of the Municipal Act, and no evidence was given at the trial upon which a division of their liability could be based, nor was any such division suggested.

FALCONBRIDGE, C.J., concurred.

BRITTON, J.—Without expressing any opinion as to the admissibility of the statement made by deceased to Hapgood on the night of the accident . . . I agree entirely with my brother Street upon the other branch of the case. There remains evidence upon which a Judge could properly find in favour of plaintiffs. . . .

OSLER, J.A.

DECEMBER 28TH, 1903.

C.A.—CHAMBERS.

BREADY v. GRAND TRUNK R. W. CO.

HUGHES v. GRAND TRUNK R. W. CO.

*Appeal—Court of Appeal—Consolidation of Two Appeals—
Directions for Printing.*

Motion by defendants for directions as to the manner in which the appeal books should be prepared, the appeal cases having been settled. The actions arose out of the same accident; the pleadings were the same in each; they were tried as one action, the evidence being applied to each, as also were the answers of the jury; the reasons for and against the appeal were the same.

H. E. Rose, for defendants.

H. W. Mickle, for plaintiffs.

OSLER, J.A.—An order will be made as in *Beam v. Beatty* and *Bunting v. Beatty*, Order Book No. 9, pp. 270, 271, except that if the books are to be printed, instead of a separate book of the evidence a complete appeal book is to be made up, in one case, of statement of case, pleadings, evidence, reasons for and against appeal, etc., and reference is to be made in the other to the evidence as printed in the former. In the event of the cases going further, there will thus be one of them in which it will not be necessary to reprint any of the proceedings. The answers of the jury must be set out in each case, but it is not necessary to print more than a brief abstract of or reference to the letters of administration to the plaintiffs, in the form the defendants propose, as it is evident that nothing turned upon them at the trial. Costs (as of one motion) in the appeal.

OSLER, J.A.

DECEMBER 28TH, 1903.

C.A.—CHAMBERS.

RE NORTH YORK PROVINCIAL ELECTION.

KENNEDY v. DAVIS.

*Parliamentary Elections—Controverted Election Petition—
Examination of Respondent for Discovery—Questions Relating to Previous Election—Corrupt Practices—Previous Election Declared Valid—Corrupt Offer Renewed at Present Election—Length of Examination—Adjournment—Attendance—Discretion.*

Motion by petitioners to compel respondent to attend at his own expense and submit to be further examined and to com-

plete his examination for discovery and to answer a certain specified question and also all questions relating to or connected with allegations of matters of a corrupt character practised by the respondent or his agents at the Provincial election of May, 1902, for the same riding, as well as all questions having reference to similar acts connected with the election which was the subject matter of the present petition.

S. B. Woods, for petitioners.

A. B. Aylesworth, K.C., for respondent.

OSLER, J.A.—The main question argued was whether the respondent was liable to make discovery of corrupt practices committed by himself or his agents at the election of 1902. At that election the respondent and Mr. T. H. Lennox were candidates, and the respondent was returned as being duly elected. A petition against his return was presented, in which one of the present petitioners was also a petitioner. A cross-petition against Mr. Lennox was also presented. Both petitions came on for trial before an Election Court in January, 1903, and were then tried and dismissed, and the Court certified that the respondent Davis was duly elected and returned as member for the electoral division. Some time afterwards the respondent resigned his seat, and a new election was held, at which he and Lennox were again candidates. The respondent was again returned, and against that return the now petition was presented and is now pending.

The election of 1902 not having been set aside or avoided, sec. 171 (3) and sec. 179 of the Election Act need not be referred to. It was, on the contrary, upheld and affirmed and certified to be a good and valid election. That determination is, by sec. 55 of the Controverted Elections Act, final to all intents and purposes, and the present election, not having been held in consequence of the avoidance of the election of 1902, is a new election disconnected from and not a part of or continuance of the former election: *Cornwall Election (Dom.)* (2), H. E. C. 647; *Burrough of Dungarvan*, 2 P. R. & D. 300, 309. As I read these cases and the cases of *Stevens v. Tillet*, L. R. 6 C. P. 147, 161, 162, 165, 175, and *Waygood v. James*, L. R. 4 C. P. 361, corrupt practices said to have been committed by the now respondent at the former election, on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, now be inquired into for the purpose of invalidating the present election. Therefore, in

so far as it is sought to permit a general inquiry on this examination into such corrupt practices, I hold, as at present advised, that there is no such right, unless it can be shewn that they are in some way connected with and are still operative upon the present election.

In the Windsor Case, 2 O'M. & H. 89, the question was whether acts of intimidation by an employer against his workmen at a former election could be given in evidence on a petition against a subsequent election. The evidence was admitted, not on the ground that they were corrupt practices at the previous election, but because, under the circumstances, they were or might be still operative in the minds of the workmen. "Unless you can shew," said Baron Bramwell, "that the bribery or threat is one the force of which is still in existence, it is not a bribe or threat which will avoid the election."

To that extent, therefore, the examination sought may be proper; at least I do not see my way to restrain it, in the absence of any specific inquiry or question, which, except in the instance I shall presently refer to, has not yet arisen. That instance, however, will serve as an illustration of the extent to which only, as I conceive, the examination can be pressed. On this part of the motion I only add with respect to *Stevens v. Tillet*, supra, which Mr. Woods relied upon, that the Court distinguished between the case of the certificate of the Judges as to the status of the sitting member, which is final, and their report as to the petitioner or candidate, which is not. Therefore, although by their report they absolved the latter in respect of the recriminatory charges against him and set aside the election, that report did not prevent such charges from being again brought forward on a petition against his return at the succeeding election. The decision affords no ground for the conclusion—indeed is quite opposed to it—that on a subsequent election, like that now in question, evidence of corrupt acts by the same respondent at a previous election, can be given.

2. A question, No. 1719, was asked of the respondent: "Now, do you still refuse to say whether there was any discussion between you and Absalom Wilson with reference to his appointment to a public position prior to the present election?"

The respondent, on the advice of counsel, refused to answer, and he was then asked: "And this refusal is with the knowledge that the question is asked on the ground that we assert that the matter was again discussed and renewed prior to the bye election?"

Counsel for the respondent: "Quite so."

"1721. And we expect to be able to prove that it was an inducement to Wilson to support Davis at the bye election?"

Counsel for the respondent: "Your statement is absurd, because prior to the general election Mr. Davis could not have known that there was going to be a bye election."

Mr. Lennox: "It was renewed prior to the bye election."

The question was not answered.

In my opinion, it should have been.

The examination of the respondent was proceeded with at great length, whether necessarily so or not I do not know, but if it is not continued with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed.

The examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it. The respondent's counsel refused to consent to any enlargement or adjournment, and stated that if it was enlarged the respondent would not attend. The examiner said that if that was the case it was useless for him to fix a time, and enlarged the examination sine die. The course pursued is not that which the respondent should have taken, and, finding him to be in default as regards the above specified question, I must direct that he shall attend before the examiner at such time and place as he shall appoint in order that the examination shall be proceeded with.

It is perhaps needless to add that the view I have indicated as to the principal question argued does not in the least affect the right of the petitioner, if so advised, to take the opinion of the trial Judges unembarrassed by my decision, and to frame his particulars in the widest possible way in setting forth the charges of corrupt practices which he may deem open to him.

I make no order as to costs.

CARTWRIGHT, MASTER.

DECEMBER 29TH, 1903.

CHAMBERS.

PARKE v. HALE.

Security for Costs—Action for Defamation—Defence—Fair and Accurate Report of Public Meeting — Municipal Council Meeting—Financial Liability of Plaintiff—Property Exigible under Execution—Criminal Charge.

Action for libel. Plaintiff complained of an article published in a newspaper. Defendants moved for security for

costs upon an affidavit stating that the article was a fair and accurate report of a public meeting of the municipal council of the town of Orillia—"which publication was for the public interest." The affidavit further declared that the plaintiff was not possessed of property sufficient to answer the costs of the action.

C. A. Moss, for the defendants.

W. M. Boulton, for plaintiff.

THE MASTER.—The plaintiff's cross-examination shews that while he is in receipt of a good annual income from his profession as an electrical engineer, he has not unincumbered personal property more than sufficient (to put it most favourably) to meet an unsatisfied judgment for \$400 which has been standing against him since June, 1902, and on which no substantial payments have yet been made.

He also has an interest in certain real estate in or near the town of Cornwall under the will of his mother's father.

The will has been produced. From it the plaintiff would seem not to have any interest which would give security to a defendant in the sense of being practically exigible under execution, or of such a nature that a prudent man would lend money on it. The devise in question reads: "In trust for the benefit of my daughter Louisa, . . . for life . . . and after her death for the benefit of my said daughter's children." In the next clause the trustees are directed, on the daughter's death, to convey the lands so settled to her surviving lawful children and to the descendants of such, if any, of the children as may have died. From this it would appear that there is nothing vested in any one of the children or grandchildren until the death of the plaintiff's mother; and, even if vested, the plaintiff's interest could only be made available by further proceedings. In his cross-examination he says (question 57) that the whole property is worth \$10,000 to \$12,000, and that there were eleven children, but three have died without issue, leaving at present eight to share. There is no evidence of the age of the plaintiff's mother. He himself is neither a householder nor freeholder.

Mr. Boulton argued very strenuously that in any case the defendants were not entitled to security, because the meeting in question was not a public meeting within the meaning of the Act, as interpreted by the corresponding English Act of 1887, and subsequent Act of 1889. The point has never been decided in this Province. But, however serious it may prove to the defendants at the trial or on a demurrer to the statement of defence, I do not think I can decide it now, in face of the defendants' affidavit that the publication is for the

benefit of the public. Both allegations shew a good defence, if they can be proved. And that is all that can be decided on this motion, as the cases shew. . .

[Bready v. Robertson, 15 P: R. 7, referred to.]

The motion will be allowed.

Costs will be in the cause.

I have not overlooked the argument that the statements made at the meeting, as reported, amounted to a criminal charge, under sec. 360 of the Code. The expression said to have been used by the mayor and Councillor Sanderson, that the council was being "held up" by the plaintiff, does not seem to me capable of that construction, nor the following, "A suggestion that (the plaintiff) be asked to come up and point out that \$7,000 worth of machinery, raised an ironical laugh."

If the payment of a demand is made with full knowledge of the facts, I do not see how the payment could afterwards be made a ground of criminal proceedings against the receiver by those who paid it to avoid a civil action, and however much they may think, rightly or wrongly, that it is a case of sharp practice.

CARTWRIGHT, MASTER.

DECEMBER 29TH, 1903.

CHAMBERS.

GAMBELL v. HEGGIE.

Particulars—Seduction—Times and Places—Special Damage—Stage of Action at which Particulars Ordered—Formal Affidavit of Defendant Denying Seduction—Right of Plaintiff to Cross-examine.

Motion by defendant for particulars of dates, times, and places and of special damage alleged, in an action for the seduction of the plaintiff's daughter.

W. E. Middleton, for defendant.

T. J. Blain, Brampton, for plaintiff.

THE MASTER.—The defendant has filed an affidavit, as required by the practice, denying most positively the plaintiff's allegations. On the return of the motion Mr. Blain asked for an adjournment in order to cross-examine defendant, as he contended he was entitled to do under Rule 490. Mr. Middleton objected that by appearing on the motion without having taken out any appointment for that purpose plaintiff had waived his right, assuming he had such right. . . . Mr. Middleton also drew attention to the fact

that plaintiff had not brought himself within such cases as *Robinson v. Sugarman*, 17 P. R. 419, by making an affidavit that he was unable to give any particulars without examining defendant. He also contended that on the principle of *Dryden v. Smith*, 17 P. R. 500, plaintiff could not be allowed to have what would be equivalent to an examination for discovery before giving particulars of the statement of claim.

I enlarged the motion to allow plaintiff to file an affidavit (if so advised) and restrained any cross-examination of either party in the meantime.

On the motion coming on again Mr. Blain stated that plaintiff declined to file any affidavit, and he insisted again on his right to cross-examine defendant on his affidavit filed. The argument proceeded, on my direction, notwithstanding the objection.

It is quite clear, as was said in *Mason v. Van Camp*, 14 P. R. 296, that at some time or other, and in time to enable him to meet it at the trial, the defendant is entitled . . . to all necessary particulars of plaintiff's claim. . . .

This is not denied by Mr. Blain, but he contends that the order should not be made before defence filed.

Usually, no doubt, this has been the case, but in *Knight v. Engel*, 61 L. T. 780, it was decided that, the defendant having made such an affidavit as he has in this case, particulars should be ordered before defence.

I have not been referred to any cases in our own Courts where the order has been made at this stage, nor have I been able to find any. I do not, however, see any objection to it on principle. Particulars, it was said in *Milbank v. Milbank*, [1900] 1 Ch. 384, are only amendments of the pleadings. . . . In the present case no child of the alleged seduction has yet been born. . . . The defendant has no means of protecting himself against an unfounded accusation unless particulars are furnished. . . .

[*Marriner v. Bishop of Bath and Wells*, [1893] P. 146, *Smith v. Boyd*, 17 P. R. 463, 467, *Odgers on Pleading*, 5th ed., pp. 114, 132, referred to.]

I am of opinion that the order should be made as asked in deference to the cases cited. They seem to me also to dispose of Mr. Blain's argument that he is entitled to cross-examine the defendant. The reason of Rule 490 is surely this, that affidavits are almost universally filed to settle disputed questions of fact, and in all such cases cross-examination is right and proper. But here the case is different, and the maxim "*cessante ratione cessat lex*" may properly be applied. No disputed question of fact is before the Court on this motion. . . . The affidavit of defendant is

only filed for the information of the Court and as a proof of good faith of the defendant.

The order must go as asked, requiring plaintiff within three weeks to furnish the particulars asked, including those of special damage (see Odgers on Pleading, 5th ed., p. 196). The time for filing the statement of defence will be extended so as to run only from the service of such particulars.

Both points under discussion being new, costs will be in the cause.

MEREDITH, C.J.

DECEMBER 29TH, 1903.

WEEKLY COURT.

SLEMIN v. SLEMIN.

*Receiver—Equitable Execution—Judgment for Alimony—
Attempt to Reach Pension under Benefit Fund—
“Creditors.”*

Motion by plaintiff for an order continuing her as receiver of certain moneys. The action was for alimony, and by an order of 9th December, 1901, defendant was directed to pay plaintiff interim alimony at the rate of \$5 a week from the service of the writ of summons, \$2.70 for interim disbursements, and \$69 for prospective disbursements. Nothing had been paid on account of the alimony or disbursements. The defendant was a member of the police force of the city of Toronto, and was a member of “The Police Benefit Fund,” a friendly society incorporated under the provisions of R. S. O. 1897 ch. 211. He had retired from the police force, and under the rules of the society, as plaintiff alleged, was entitled to a pension of \$1 a day during his life. By a rule of the society, every application for a pension must come before the Benefit Fund committee, whose duty it was to go fully into the circumstances of the case and report on it to the Board of Police Commissioners, with whom rested the final determination as to the disposition to be made of the application. Defendant had not yet applied to the society for his pension, and it had not yet been awarded to him. The pension, according to the affidavit of plaintiff, is payable from the date of the defendant’s retirement from the police force.

Section 12 of R. S. O. ch. 211 provides that when under the rules of a society money becomes payable to a member, such money shall be free from all claims by the creditors of such member.

W. J. O’Neail, for plaintiff.

J. M. Godfrey, for defendant.

MEREDITH, C.J., held that the word "creditors" in sec. 12 is to be read as the equivalent of "persons to whom the member is indebted or to whom he is liable to pay money." A claim for alimony is not a debt provable under the Bankruptcy Act, and instalments of alimony do not constitute such a debt as can be proceeded for by an action (*Lee v. Lee*, 27 O. R. 193); but the object of sec. 12 is to preserve for the use of the member the moneys which become payable to him according to the rules of the society, an object which would be frustrated if they could be reached by a person to whom the member is under a liability to pay money, though the liability does not create a legal debt in the strict sense of the term "debt." If plaintiff is not a creditor of defendant, it is difficult to see what right she has to call upon the Court for relief in the nature of equitable execution. Arrears of a pension constitute a debt which may be attached: *Booth v. Traill*, 12 Q. B. D. 8; *Trust and Loan Co. v. Gorsline*, 12 P. R. 654; but an unearned pension cannot be reached either by that procedure or by the appointment of a receiver: *Trust and Loan Co. v. Gorsline*, supra; *Central Bank v. Ellis*, 20 A. R. 364; *Holmes v. Millege*, [1893] 1 Q. B. 551. Defendant has not made any application for a pension, and none has been awarded to him; he may not apply, and if he does his application may not be successful.

Application dismissed without costs.

MEREDITH, C.J.

DECEMBER 29TH, 1903.

WEEKLY COURT.

HAYCOCK v. SAPPHIRE CORUNDUM CO.

Mechanics' Lien — Action to Enforce—Parties—Subsequent Incumbrancers — Execution Creditors — Incumbrance Arising pendente Lite — Notice of Trial—Judgment—Setting aside.

Petition by the Hamilton Powder Co. to have their name struck out of the judgment and to vacate the judgment so far as it affects them. The action was brought to enforce a mechanics' lien against the lands of the defendant company, and was tried before the local Master at Peterborough under sec. 35 of the Mechanics and Wage-Earners' Lien Act, R. S. O. ch. 153. The petitioners were at the time of the trial judgment creditors of defendant company, having a *fi. fa.* goods and lands in the hands of the sheriff of Peterborough. The judgment recited that the petitioners had a lien on the lands, and declared that

plaintiffs and others were entitled to mechanics' liens, but did not otherwise affect to settle priorities. The petitioners were not served with any notice of trial, and they did not appear at the trial or prove any claim. The trial was on 20th June, 1903, and their *fi. fa.* was placed in the sheriff's hands only on the 15th June, 1903.

F. E. Hodgins, K.C., for the petitioners.

W. H. Blake, K.C., for plaintiffs.

MEREDITH, C.J.—In actions for the foreclosure of mortgages . . . it is not necessary to add as a party in the Master's office an incumbrancer whose incumbrance comes into existence *pendente lite*: *Robson v. Argue*, 25 Gr. 407, and other cases referred to in *Holmsted & Langton*, 2nd ed., p. 910; though it would appear that a different rule is to be applied in a partition action: *Robson v. Robson*, 10 P. R. 324. In proceedings under the Mechanics' Lien Act, sec. 36 seems to render it unnecessary to consider how far one or other of these modes of procedure would be the proper one to apply, for it is the persons who are incumbrancers at the time fixed for serving notice of trial, that is, eight days before the trial, and those only, who are required to be served, service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in.

Order made that the name of the petitioners and all reference to their claim be stricken out of the judgment. Plaintiffs to pay to petitioners a portion of their costs, fixed at \$20.

MEREDITH, C.J.

DECEMBER 29TH, 1903.

TRIAL.

TORONTO HARBOUR COMMISSIONERS v. SAND AND DREDGING.

Contract—Work and Labour—Breach by Contractors—Completion of Work by Employers—Notice to Contractors—Assent by them—Reasonable Expenditure by Employers—Recovery from Contractors—Construction of Contract—Condition Precedent.

Action to recover the amount expended by the plaintiffs in dredging in the harbour of Toronto for the purpose of removing obstructions to the entrance to certain wharves or slips, which was part of the work which the defendants (incorporated as "Sand and Dredging," called in the judgment

“the contractors”) contracted to do for the plaintiffs by an agreement dated 6th March, 1902.

A. M. Stewart, for plaintiffs.

J. M. Godfrev, for defendants.

MEREDITH, C.J.—The contractors, according to the provisions of the agreement, were to complete so much of the work as consisted of “dredging of the range course and at the various slips and wharves in the said harbour” on or before the 14th May, 1902, and the rest of it by a later date.

The agreement further provided that if the contractors should not proceed with the work in accordance with the terms of the contract and of the specifications for the work to the satisfaction of the plaintiffs’ engineer, and so as to ensure in his opinion the satisfactory completion of the work by the time provided in the agreement for its completion, or should not complete it within that time, the plaintiffs might either before or after “the completion (sic) of the work, if they should see fit, complete any portion of it and deduct the expense so incurred from any moneys due to the contractors under that or any other contract, or might, after twenty-four hours’ notice to them, make such new arrangements as the plaintiffs might deem expedient for the completion of the work:” paragraph 8.

The contractors also covenanted with the plaintiffs that, upon receiving notice that such new arrangements had been made or that the works would be completed by the plaintiffs as provided by paragraph 8, they would forthwith give peaceable possession of the works to the plaintiffs or their engineer, and that they would not delay or hinder the plaintiffs in the execution of the works, and that the cost and expense occasioned by and incidental to the making of such new arrangements for the completion of the works might be, with all increase in cost occasioned by the contractors’ non-completion, deducted from any moneys in the hands of the plaintiffs or recovered from the contractors as money paid at their request.

The contractors did not begin the work in time to insure its completion by the time named in the agreement, and the engineer, having come to the conclusion that they had failed to proceed with it so as to insure the satisfactory completion of it by that time, gave written notice to the contractors that he had so decided, and that it would be his duty, after the expiry of twenty-four hours, to make arrangements for the completion of the work then urgently required to permit vessels to unload at the several wharves.

This notice was mailed to the contractors on the 2nd May, 1902, but was not received by them until half past nine o'clock of the morning of the 5th of that month.

The engineer on the 5th May, 1902, employed Frank Simpson to do the work referred to in the notice, for which he was to be paid at the rate of \$8 an hour working time, and to be allowed for the time employed in removing his dredge and scows from Church street to and returning them from the work.

Simpson began his work on the same day and was employed from that day up to and including the 21st May, Sundays excepted, the number of hours being one hundred and sixty-eight.

It is beyond question that the contractors assented to the propriety of the course which was taken by the engineer, though it was no doubt not anticipated either by them or by the engineer that Simpson would be employed for so long a period as he was actually occupied in doing his work.

I find, however, that what was done by the engineer was reasonable under the circumstances, and that it was necessary to employ Simpson for the whole time for which he was employed, in order to enable incoming vessels to reach the wharves, where they were to be unloaded, which it was impossible for them to have done until the entrance to the wharves had been cleared by dredging.

I find also that there were no means available to the contractors for doing the dredging that was done by Simpson at the time when it was necessary to do it, and it was done by him.

It was not in my opinion a condition precedent to the plaintiffs exercising the right of completing a part of the work—they not desiring to take the whole of it out of the hands of the contractors—that they should first give twenty-four hours' notice to the contractors of their intention to do so, but the notice was required only if the plaintiffs should desire to make new arrangements for the completion of the whole work.

If, however, the notice was necessary in both cases, what took place between the contractors and the engineer was, in my opinion, a waiver of notice or an acquiescence in the one which was given as a sufficient notice. The contractors' letter of the 5th May amply warrants this conclusion and makes it clear that they consented to the engineer making such arrangements as he might deem necessary for doing such of the work as would not admit of delay, and, as I have already said, the work that Simpson was employed to do was of that character.

It was contended by counsel for the defendants that in any case the plaintiffs, if they exercised the right conferred on them by the contract of doing part of the work, were not entitled to look to the contractors for reimbursement of their expenditure in doing it, and that their only right was to retain what should be owing to the contractors on account of the work which had been or should be done by them under the agreement or any other contract with them.

I am not of that opinion; such an arrangement is an unlikely one to have been in the contemplation of the parties, and it seems to me, therefore, that the provision of the 9th paragraph ought to be construed so as to include the expenditure which is in question, if its words can be given that meaning.

The words "all increase in cost occasioned by the contractors' non-completion" are, in my opinion, sufficient to include this expenditure, and, therefore, the plaintiffs, in addition to being entitled to deduct the amount of it from any moneys owing by them to the contractors, are also entitled to recover it from them as money paid at their request.

If I am wrong in this view and there is no express provision requiring the contractors to pay the additional expense which was caused by their delay, they would, I think, be liable for it as damages occasioned by the breach of their covenant to do the work.

The plaintiffs' claim, including the engineer's charges in connexion with the work done by Simpson, amounts to \$728.11, made up of the difference between the cost of the work (\$1,344) and what it would have cost at the price which was to be paid to the contractors (\$652.46), amounting to \$691.54, and \$34.57 for the engineer's charges.

I do not think that the plaintiffs are entitled to charge the whole \$1,344 to the contractors. Simpson was a tenderer for the work when it was originally let by the plaintiffs, and then offered to do it at the rate of \$8 an hour, or 15 cents per cubic yard. It is most likely, had the engineer required him to do the work in question on the same terms, that he would have undertaken to do it on those terms; and I have no doubt that he would have undertaken it, if not at 15 cents a yard, at a price per yard which would have resulted in the work being done at a cost considerably less than \$1,344; the engineer, however, made no such request, but accepted the offer of Simpson to do the work at the price ultimately agreed on, \$8 an hour, without question. It appears also that Simpson was allowed for the time occupied in standing by with his dredge while one or two vessels

passed through to the wharf, and in assisting the vessels to do so, and this work the contractors were not bound to do, and are, therefore, not chargeable with the cost of it.

At 15 cents a yard for the 6941 yards dredged by Simpson, the cost would have been, instead of \$1,344, \$1,041.15. A sum approaching the mean between these two sums seems to me to be a reasonable one, and I therefore allow for the expenditure, including the engineer's charges, \$1,150, which makes the loss to the plaintiffs owing to the contractors' default, \$497.54, from which is to be deducted \$250, the amount in the hands of the plaintiffs belonging to the contractors, leaving the balance due to the plaintiffs \$247.54, for which, in my opinion, they are entitled to judgment against the defendants.

It follows that the defendants' counterclaim to recover the \$250, and a further sum of \$150.39, which they say would have been coming to them if only necessary work had been done by Simpson, and it had been done as expeditiously as it might have been, must be dismissed.

The plaintiffs are entitled to their costs on the High Court scale.

DECEMBER 29TH, 1903.

DIVISIONAL COURT.

GRAHAM v. BOURQUE.

Chose in Action—Assignment of—Scope—Money to Become Payable "in Respect of the Contract"—Compensation for Breach of Provision Implied in Contract—Attachment of Debts.

Appeal by plaintiff from order of STREET, J., in Chambers (ante 927) reversing order of local Judge at Ottawa, and deciding in favour of the claimants, the Bank of Ottawa, a question arising upon a garnishing application made by plaintiff after judgment recovered against defendant. The moneys garnished were the fruits of a judgment recovered by defendant against the corporation of the city of Ottawa for damages for interference with defendant in the performance of work under a contract with the city. Defendant had assigned to the Bank of Ottawa all moneys coming to him in respect of the contract. STREET, J., held that the moneys recovered under defendant's judgment were covered by the assignment.

A. B. Aylesworth, K.C., for plaintiff, contended that the moneys were not in respect of the contract.

W. E. Middleton, for the Bank of Ottawa, contra.

THE COURT (MEREDITH, C.J., MACMAHON, J., TRETZEL, J.), held that, as defendant could not have completed the

contract or become entitled to the moneys payable thereunder without doing the additional work caused by the discharge of the sewage into the trenches dug by him, owing to a breach of duty on the part of the city corporation, the additional expense so caused was to enable him to complete the work, under the altered conditions which had arisen, and was therefore "in respect" of the contract. *Brush v. Trustees of Whitehaven*, 52 J. P. 392, *Hudson on Building Contracts*, 2nd ed., vol. 2, p. 121, followed. Appeal dismissed with costs.

CARTWRIGHT, MASTER.

DECEMBER 31ST, 1903

CHAMBERS.

WADE v. PAKENHAM.

*Parties—Third Parties—Company—Directors—Partnership
—Illegal Payment—Setting aside Third Party Notice.*

Motion to set aside a third party notice served on one Renfrew by the defendants Kendrick, Forsyth, Boyer, and Pakenham. The plaintiff was the liquidator of the Pakenham Pork Packing Co., Limited, under order of 11th June, 1903. The defendants above named were members of the Pakenham Pork Packing Co., a co-partnership formerly carrying on business at Stouffville. The limited company was formed in June, 1901, to purchase the business of the partnership, and in pursuance of this object the shareholders of the company at a meeting held on 2nd April, 1902, authorized directors when elected to carry out the terms of an agreement dated May, 1901, authorizing purchase of the business of the partnership for the consideration therein named and clear from all incumbrances.

At the same meeting five directors were elected, two of the defendants to this action, Pakenham and Boyer (who were also members of the partnership) being two of them. The parties sought to be added as third parties were the other three. On the 4th July, 1902, the agreement sanctioned by the shareholders was duly executed by all necessary parties, the consideration for the purchase by the company of the business being stated to be \$20,000 cash, \$10,000 in fully paid up shares to be delivered to James Pakenham, and a further sum to be paid to the partnership for outlay by them subsequent to the agreement of May, 1901.

All this was done by the company. But prior to that, on 4th June, 1902, the directors passed a resolution providing for the business being carried on by the partnership until the company was ready to take it over, and agreeing to "in-

demnify and save harmless the partnership from all loss occasioned by the continuation of the said business by the said partnership." Under this resolution the business was so carried on until 19th November, 1902, when another resolution was unanimously passed by the directors authorizing a new agreement, which, after reciting the agreement of 4th July, and purporting to be in pursuance thereof, assumed to promise and covenant with the partnership to pay off, indemnify, and save them harmless from all the liabilities and obligations of the partnership in connexion with the business. These liabilities, when afterwards submitted, made up a total of \$30,736.85, of which \$30,094.63 was due to the Standard Bank. That resolution further provided that the agreement, with list of debts attached, should be submitted to the directors for approval before being finally executed.

On 21st January, 1903, the directors by resolution authorized the making of the agreement of November, 1902, and assuming the liabilities to the amount of \$30,736.85. Renfrew alone voted against this resolution. On 27th October, 1903, the liquidator commenced this action against the four members of the partnership, James Pakenham individually, and the Standard Bank, to recover in all a little over \$50,000, "the amount wrongfully paid by the company in discharge of the indebtedness of the partnership and its members to the Standard Bank and other persons." on the ground that the resolution of 21st January, 1903, authorizing the agreement of 19th November, 1902, was beyond the powers of the directors and in violation of their trust, and asking to have the agreement of November, 1902, cancelled, and the resolution authorizing it declared illegal and void.

On 14th December, 1903, on application of defendant Kendrick, an order was made *ex parte* to have Renfrew and the other two directors, Clarke and Morden, added as third parties, on the ground of the resolution of 4th June, 1902, and because, in the view of the defendants, the sums sought to be recovered by the liquidator represented losses incurred while the business was being carried on by the partnership pursuant to that resolution; and because of the subsequent resolution of 19th November, 1902, and the execution of the agreement of that date, and that there was an implied warranty by the directors that they had power to do what it was now sought to have declared by the Court to have been illegal and void.

This motion was to set aside this third party notice and order on which same issued, on behalf of Renfrew only.

R. McKay, for Renfrew.

J. W. McCullough, for Kendrick.

W. S. Ormiston, for Forsyth.

THE MASTER referred to *Wilson v. Boulter*, 18 P. R. 107; *Confederation Life Assn. v. Labatt*, 18 P. R. 267; *Windsor Fair Grounds Assn. v. Highland Park Club*, 19 P. R. 130; *Langley v. Law Society*, 3 O. L. R. 199; and *Miller v. Sarnia Gas Co.*, 2 O. L. R. 546: and proceeded:—These cases seem to make the test of the propriety of the application of the Rule to be: "Are there common questions between all the parties, which, if decided in favour of the plaintiff, would give the defendant a right to indemnity against the third party on the ground of contract express or implied?" And which would entitle the defendant to recover against the third party the very damages which the plaintiff recovered against him. In the present action the plaintiff asks the Court to declare two things, 1st, that the payments which he seeks to recover were not in discharge of debts of the company, and 2nd, that the resolution of January last, which authorized such payments, was void. He must succeed in both these contentions unless he is to fail in his action, which really asserts a breach of trust on the part of the directors. The plaintiff attacks only the resolution of January, 1903, and does not notice the resolution of November on which the defendant relies as conferring the necessary right to indemnity as against third parties. But the resolution of November was only provisional. When it was passed there was no list of liabilities produced. When this was made known at the January meeting Renfrew refused to agree to it. Whatever may be said as to the position of the other two, it is clear that Renfrew was not in any way answerable for anything done or suffered by the partnership in reliance on that resolution; and it is equally clear that the resolution of November bore on its very face its merely provisional character. The concluding paragraph of that resolution, as set out in Kendrick's affidavit, makes this very plain.

The first paragraph was only carrying out what had long been agreed on between the limited company and the partnership as long ago as July previous. By this the liquidator was bound, as he must admit, and to this he, as liquidator, could not possibly make any objection. It is to rescind the second paragraph, when consummated by the resolution of January last, that he seeks the aid of the Court and claims recovery of money wrongfully paid before as well as after that date, as appears from the particulars of the statement of claim.

But, whatever may be hereafter decided as to the position of those directors (including, be it always remembered, Pakenham and Boyer, who now as defendants are seeking indemnity from their co-directors against their own acts), who voted for the resolution and authorized the payment of the amounts set out in schedule A., Renfrew, who voted against that resolution, cannot be held personally responsible.

The very peculiar facts of this case, and the dual character of Pakenham and Boyer as members of the partnership and afterwards directors of the limited company, present an insuperable difficulty to the application of the third party practice. Whatever rights the other two members of the partnership, Forsyth and Kendrick, may have against the directors or some of them, it is inconceivable that Pakenham and Boyer, as defendants to the action and members of the partnership, can call upon the directors, including themselves, to indemnify them against what they not only did, but did in defiance of the opposition of Renfrew at least. For there is no contribution among joint tort-feasors. There is also the other objection, that the recovery sought by the plaintiff is for sums different from these mentioned in the agreement of November. So that even the alleged indemnity is not co-extensive with the plaintiff's claim, and so the present case does not comply with the rule laid down in *Miller v. Sarnia Gas Co.*, supra. So far as I can understand the matter, it is only Kendrick and Forsyth that can have any claim against the directors, and, for the reasons already given, they must be left to take such an action as they may be advised to assert such claim, if any exists. The third party notice must be discharged, as not being suitable to a case presenting such peculiar complications as the present.

I see no good reason for depriving Renfrew of his costs.

CARTWRIGHT. MASTER.

DECEMBER 31ST, 1903.

CHAMBERS.

KNAPP v. CARLEY.

Lis Pendens—Motion to Vacate—Tying up Land pending Result of Previous Action—Summary Dismissal of Action.

In October, 1902, an agreement was made between Knapp and Carley to exchange farms on 1st March, 1903. However, on the previous day, Carley conveyed his farm to Patterson; and on 2nd March Knapp brought an action against Carley and Patterson to have this sale set aside as being fraudulent and void, and to enforce specific performance of the agree-

ment of October. The action was defended, and Carley paid into Court \$200, which he alleged had been agreed on as liquidated damages for breach of the agreement, if any agreement had been made, which he denied. The action was tried on 18th May, and judgment was given dismissing it as against Patterson without costs, but finding that Carley had committed a breach of the agreement of October, and directing a reference to assess damages, further directions and costs being reserved. The reference proceeded forthwith, and on 21st August the local Master made his report fixing damages at \$220. In the meantime Carley appealed to a Divisional Court from the judgment at the trial, and this appeal was argued and stood for judgment.

The certificate of *lis pendens* registered in respect of that action was vacated by an order, made on the defendants' application, in November.

While the appeal was pending, and, as it would seem, in consequence of the *lis pendens* having been discharged, or a motion made for that purpose, Knapp began a new action on 28th October, 1903, against Carley alone, and another on 21st November, 1903, against Carley and Patterson, so indorsing his writ of summons in each case that he was able to obtain a *lis pendens* in each, both of which were duly registered, though neither writ was served up to the middle of December, 1903. In the first of the new actions plaintiff's claim was for an injunction restraining Carley from dealing in any way with the mortgage which Patterson had given him to secure balance of unpaid purchase money on the land in question in the original action, on the ground that he should be prevented in this way from defeating the claims of the plaintiff and his other creditors. In the second action the claim was for a decree declaring that the sale by Carley to Patterson was made without proper consideration and with intent to defeat the plaintiff and other creditors of Carley, and for an order setting aside the conveyance to Patterson and declaring the lands liable to the claim of the creditors of Carley, though, so far as appeared, there were none. On discovering what had been done, the defendants at once moved to vacate these certificates of *lis pendens* and dismiss both actions as being an abuse of the process of the Court.

C. A. Moss, for defendants.

Grayson Smith, for plaintiff.

THE MASTER.—I have no doubt at all that the actions should be dismissed. The plaintiff has no interest in the lands, and is not claiming any. Any such claim was dismissed by the Chancellor, and plaintiff was remitted to dam-

ages, as his sole remedy. In this he acquiesced by going on with the reference.

The present actions are clearly brought to prevent, if possible, the defendant Carley from alienating his property, which would otherwise be liable to satisfy the plaintiff's claim in the original action, if he succeeds in the final stage.

By his own evidence it is plain that the plaintiff is not a creditor of Carley at all—much less is he a judgment creditor. . . [Burdett v. Fader, 2 O. W. R. 942, referred to.] These actions are attempts to reach the same end, but by the way of a new action and *lis pendens*, instead of by injunction, as there. No such action is maintained (see *Holmested & Langton*, p. 80, and cases there cited in last paragraph), and so should be dismissed (see *ib.* p. 136 and cases cited there and in *Burdett v. Fader*.) A little consideration will shew that this must be so. For all we can tell, the original action may travel to the Supreme Court (the title to land being in question), and that Court may reverse the Court of Appeal after it has reversed the Divisional Court, which may reverse the trial judgment. This is exactly what did happen in the case of *Thompson v. Coulter*, 1 O. W. R. 205, and in many earlier cases such as *Beatty v. North-West Transportation Co.* If the present actions are maintainable, the defendants, if successful in the Divisional Court, could commence a similar action against Knapp, if he went to the Court of Appeal, to restrain him from alienating or incumbering his lands. Then, are the lands of both litigants to be tied up until the final disposition of this dispute? How could either of these actions go to trial at the Brockville Assizes on 1st March if the Divisional Court has not given judgment by that time? Or if there is an appeal from the report undisposed of? This shews at once that these actions are improper; for speedy trial is of the very essence of the right to issue a *lis pendens*: see *Finnegan v. Keenan*, 7 P. R. 385. No case can be found in which a plaintiff has succeeded in restraining a prospective debtor from alienating his assets by an action *quia timet* such as the present. If Knapp was a judgment creditor, he could issue execution, which would be much more effectual than any *lis pendens*. If execution is stayed by Con. Rule 827, then he is not a judgment creditor, nor is he as yet a creditor at all, and he cannot therefore avail himself of any of the cases cited in *Holmested & Langton* on Rule 1015 and following Rules.

The affidavit of the plaintiff is such an admission of the true character of his actions as satisfies the requirements of

Jameson v. Lang, 7 P. R. 404, approved in Sheppard v. Kennedy, 10 P. R. 242, where it is said that a *lis pendens* cannot be made use of on the issue of a writ for alimony because the plaintiff fears that her writ may otherwise be fruitless.

TEETZEL, J.

DECEMBER 31ST, 1903.

CHAMBERS.

SOUTHORN v. SOUTHORN.

Arrest—Intent to Quit Ontario—Alimony—Desertion of Wife—Return to Ontario—Fraudulent Intent—Discharge—Terms—Restraint on Disposition of Property.

Motion by defendant for his discharge from custody under an order of arrest made by the Judge of the County Court of Lambton in an action for alimony. The order was made upon the affidavit of the plaintiff only, which stated that for the past eight years the defendant had been guilty of many acts of cruelty towards her and her family, and in July, 1902, deserted her and absconded from this Province to the State of Ohio; that she had no means of support; that defendant had recently returned, and, in her belief, unless an order for arrest should be made, he would quit Ontario forthwith; that he was indebted to his creditors in and about Sarnia to the extent of about \$300; that she believed the defendant intended to quit Ontario for the purpose of freeing himself from any sum which she might recover against him for alimony; that she was informed and believed that he came back to Ontario for the sole purpose of quietly disposing of his property to defraud his creditors, and her in particular, and was liable at any time to leave Ontario; that there was good and probable cause for believing, and she did believe, that unless forthwith apprehended he was about to quit Ontario with intent to defraud his creditors generally, and her in particular of her claim for alimony. The plaintiff did not disclose any other particulars or information upon which she based her belief, either as to intention to dispose of property or as to leaving Ontario. The defendant owned the house and lot in Sarnia in which his family resided, said to be worth about \$700. and that appeared to be his only asset.

I. F. Hellmuth, K.C., for defendant.

S. B. Woods, for plaintiff.

TEETZEL, J.—The affidavits shew that defendant and his wife lived for many years most unhappily, and *prima facie* plaintiff is entitled to alimony by reason of his cruelty and

desertion. But defendant did not abscond from Ontario in 1902, within the meaning sought to be conveyed by plaintiff in her affidavit; he simply left his home owing to unhappy differences with his family, and, although he went to a foreign country, did not "abscond." (Sweet's Law Dictionary and Wharton's Law Lexicon, referred to.) He is not an absconding debtor within the meaning of sec. 2 of R. S. O. 1897 ch. 79. Defendant returned to Sarnia about 3rd or 4th December, for the purpose, as stated in his affidavit, of inducing his wife to keep a man named Cook away from his (defendant's) house, and to return to live with his wife and children. He was summoned before the police magistrate at Sarnia, charged with failure to maintain his wife and children, the summons being returnable about 10th December, and on its return, he having failed to appear, a warrant for his arrest was issued, and on 11th December he was brought before the magistrate, but was released on his own bail, and the hearing of the charge adjourned. On 15th December a proposition was made by his counsel that he would return and live with his wife, provided Cook should leave the house. Plaintiff refused to agree to this, stating that she would never live with him. The proceedings were then adjourned until 22nd December, as stated in an affidavit of defendant's solicitor, with the understanding that it should be again enlarged for another week, so that defendant might return to his house and demonstrate that his offer was made in good faith. These police court proceedings were not disclosed by plaintiff in her affidavit upon which the order for arrest was obtained. In this respect, and also in respect of not having disclosed the condition of defendant's property and his means, the affidavit was, to say the least, somewhat disingenuous. The affidavits subsequently filed by plaintiff disclosed at most an intention by defendant to return to Ohio, but plaintiff's material entirely fails to disclose any intention on defendant's part to quit Ontario with intent to defraud his creditors in general or plaintiff in particular. *Phair v. Phair*, 19 P. R. 67, followed. In any view of the statements contained in the affidavits filed by plaintiff, defendant has established that he did not intend to quit Ontario with intent to defraud. Order made for his discharge, but, having regard to all the circumstances, the order should contain a clause that defendant shall not incumber or dispose of his house and lot pending the disposition of the action. Costs of the application to be disposed of by the trial Judge.

Ontario Weekly Reporter

INDEX-DIGEST TO VOL. 2 (1903).

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This digest includes all the cases decided at Osgoode Hall and other cases reported in THE ONTARIO WEEKLY REPORTER.

Where the case digested is reported in the Ontario Law Reports, a reference is added to the volume and page, thus :

Doe v. Roe, 8; 5 O. L. R. 6.

The figure "8" indicates the page of THE ONTARIO WEEKLY REPORTER.

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